TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 181.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

G. A. MAXWELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED MAY 25, 1914.

(20,714)

(23,714)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 569.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

G. A. MAXWELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 20, 1913.

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LOUISVILLE & NASHVILLE R. R. Co.
vs.
G. A. MAXWELL.

Keeble & Seay, Algood & Finley for R. R. Co.
dcock & Adcock for Maxwell.

pealed to the Supreme Court of United States of America from the upreme Court of The State of Tennessee at its December Term, 912.

UNITED STATES OF AMERICA, *ss:*

President of the United States of America to the Honorable the udges of the *of the* Supreme Court of the State of Tennessee, reeting:

ecause in the record and proceedings, as also in the rendition he judgment of a plea which is in the said Supreme Court of State of Tennessee before you, or some of you, being the highest t of law or equity of the said State in which a decision could be in the said suit between G. A. Maxwell and the Louisville & nville Railroad Company wherein was drawn in question the lity of a treaty or statute of, or an authority exercised under, United States, and the decision was against their validity; or rein was drawn in question the validity of a statute of, or an ority exercised under, said State, on the ground of their being gnant to the Constitution, treaties, or laws of the United States, the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, t, privilege, or exemption specially set up or claimed under such se of the said Constitution, treaty, statute, or commission; a ifest error hath happened to the great damage of the said isville & Nashville Railroad Company as by its complaint apS. We being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforein this behalf, do command you, if judgment be therein given, then under your seal, distinctly and openly, you send the rd and proceedings aforesaid, with all things concerning the , to the Supreme Court of the United States, together with this so that you have the same in the said Supreme Court at Washon, within 30 days from the date hereof, that the record and edings aforesaid being inspected, the said Supreme Court may further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should one.

itness the Honorable *Melville W. Fuller,* Chief Justice of the

United States, the 9th day of May, in the year of our Lord one thousand nine hundred and thirteen.

H. M. DOAK,
Clerk of the District Court of the United States for the Middle District of Tennessee.

Allowed by—

——— ———,
Associate Justice of the Supreme Court of the United States.

d UNITED STATES OF AMERICA, *ss:*

To G. A. Maxwell, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days after the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Tennessee, wherein the Louisville & Nashville Railroad Company is Plaintiff in Error, and G. A. Maxwell is Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in the said Writ of Error mentioned, should not be corrected, and why speedy *judgment* should not be done to the parties in that behalf.

Witness the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee, this the 10th day of May, in the year of our Lord, One Thousand Nine Hundred and Thirteen.

M. M. NEIL,
Chief Justice of Supreme Court of Tennessee.

Copy of the within citation received this the 13th day of May, 1913, and accept service of the above notice or citation, this May 13, 1913.

G. A. MAXWELL,
By ADCOCK & ADCOCK, *Att'ys.*

1 In the Supreme Court of the State of Tennessee, at Nashville.

Filed Apr. 8/13, J. J. Roach, Clerk.

LOUISVILLE & NASHVILLE RAILROAD CO.
vs.
G. A. MAXWELL.

To the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee:

Your petitioner, Louisville & Nashville Railroad Company respectfully shows:

I.

That heretofore, to-wit, on the 10th day of April, 1911, it began before a Justice of the Peace of Putnam County, Tennessee, a suit against the Defendant G. A. Maxwell, for the purpose of col-

lecting an undercharge of $58.30, which was made on two passenger tickets sold by said Railroad Company to Defendants in June, 1910, entitling the holders of the tickets to transportation from Nashville, Tennessee, to Salt Lake City, Utah, and return, contrary to the Act of Congress of 1887, and amendments thereto, known as the "Interstate Commerce Act," and contrary to the tariff rate filed with the Interstate Commerce Commission pursuant to said Act, and published in accordance therewith.

That on the trial of the case before the Justice of the
2 Peace before whom the warrant was made returnable, judgment was rendered against the Plaintiff, and in favor of the Defendant, and the suit dismissed at Plaintiff's cost.

Thereupon, the Plaintiff prayed, and obtained, an appeal to the Circuit Court of Putnam County, Tennessee, at Cookeville, and the cause came on for hearing before said Circuit Court at its March term, 1912, before the presiding judge thereof; when upon the pleadings, depositions, and exhibits thereto, and oral proof introduced on the trial of the case, and the entire record in the case, the Court found the issues in favor of the Defendant, and dismissed the Plaintiff's suit at Plaintiff's costs, thereby affirming the judgment of the Justice of the Peace.

Thereupon, Plaintiff prayed, and obtained, an appeal in the nature of a writ of error to the Court of Civil Appeals of the State of Tennessee, and said cause came on for hearing before said Court of Civil Appeals at its October Term, 1912, when, upon consideration of said case, said Court pronounced a decree affirming the judgment of the Circuit Court of Putnam County, and dismissed the suit at the cost of Plaintiff.

Thereupon, the Plaintiff, Louisville & Nashville Railroad Company, filed in the Supreme Court of the State of Tennessee, a petition for Writs of Certiorari and Supersedeas, to bring the case to the Supreme Court of Tennessee for review. This petition the Court granted, and placed the case on its docket for hearing.

Thereupon, at its December term, 1912, said cause came on for hearing before the Supreme Court of the State of Tennessee, and said Court, upon consideration of the entire case, on the 29th day of March, 1913, affirmed the judgment of the Court of Civil
3 Appeals, and the Circuit Court of Putnam County, Tennessee, and dismissed the suit at the cost of the plaintiff.

Petitioner further shows, that the said judgment of the Supreme Court of the State of Tennessee was and is a final judgment in the highest Court of the State of Tennessee in which a decision in said State could or can be had.

Petitioner further shows that a Federal question is made in said case, to-wit:

The Louisville & Nashville Railroad Company is a common carrier engaged in Interstate commerce, and subject to and controlled by the Interstate Commerce Act of 1887, and its amendments.

As before stated, the Defendant, G. A. Maxwell, purchased of the Louisville & Nashville Railroad Company, in the month of June 1910, at its office or agency, two tickets, one for himself and one for his wife, entitling them to transportation from Nashville, Ten-

nessee, to Salt Lake City, Utah, and return. The going trip was routed via Chicago and Denver, and the return trip was routed via Amarillo, Texas, and Memphis, Tennessee.

The published tariff rate of the tickets, routed as these tickets were which Defendant purchased, was $78.65. Said Railroad had other tickets on sale, with different routing—that is to say, going and returning the same route, or going by Chicago and returning by St. Louis, at $49.50 each. The agent of the Railroad Company inadvertently made a mistake in the rate to be charged to the Defendant for the two tickets, and instead of collecting $78.65 on each ticket, only collected the sum of $49.50, or $29.15 undercharge on each ticket, making an undercharge on the two tickets of $58.30.

4 The Act of Congress passed February 4, 1887, known as the Interstate Commerce Act, with its various amendments, prohibits the making of any different rates on passengers or freight than the regular published tariff rates.

Section 6 of this Act, provides among other things, as follows:

"And when such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

Vol. 3, Federal Statutes Annotated, 828.

By a ruling of the Interstate Commerce Commission, No. 187, it is provided as follows:

"The Commission adheres to its previous ruling, that the carriers must exhaust their legal remedies to collect undercharges."

Said Louisville & Nashville Railroad Company pursuant to advice as to its duty in the premises imposed by said Interstate Commerce Commission, brought suit to recover said undercharge, as hereinabove stated, maintaining that it was entitled to recover the same, and that a duty was imposed upon it by law, as above stated, to recover the same.

5 The said Supreme Court of the State of Tennessee decided said question adversely to the Petitioner, and said judgment of said Supreme Court was repugnant to, and in conflict with, the laws of the United States hereinabove referred to, and was contrary thereto, and a decision of said Federal question was necessary to the judgment rendered in this cause.

Wherefore, your petitioner presents herewith, an exemplified transcript of the record of the Supreme Court of the State of Tennessee in said cause, and prays that a Writ of Error to the Supreme Court of the United States be allowed; that citation be granted and signed; that the bond herewith presented by approved, and that upon compliance with the terms of the statute in such case made and provided, said bond and writ of error may operate as a supersedeas, that the errors complained of may be reviewed in the Supreme Court

the United States, and the judgment aforesaid of said Supreme Court of the State of Tennessee be reversed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By ED T. SEAY, *Att'y.*

The writ of Error as prayed for in the foregoing Petition is hereby allowed, this the 5 day of April, 1913, the Writ of Error to operate as a Supersedeas, and the bond for that purpose is fixed at the sum of $250.00.

Dated at Nashville, Tennessee, this the 5 day of April, A. D. 1913.

M. M. NEIL,
Chief Justice of the Supreme Court of the State of Tennessee.

Filed in my office this the 10 day of April, 1913.

JO J. ROACH,
Clerk of the Supreme Court of the State of Tennessee.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Tennessee, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Tennessee before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between G. A. Maxwell and the Louisville & Nashville Railroad Company wherein was drawn in question the validity of a treaty or Statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Louisville & Nashville Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you
7½ have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and

proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable *Melville W. Fuller,* Chief Justice of the United States, the 9th day of May, in the year of our Lord one thousand nine hundred and thirteen.

H. M. DOAK,
Clerk of the District Court of the United States,
for the Middle District of Tennessee.

Allowed by

____ ____,
Associate Justice of the Supreme
Court of the United States.

8 UNITED STATES OF AMERICA, *ss:*

To G. A Maxwell, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days after the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Tennessee, wherein the Louisville & Nashville Railroad Company is Plaintiff in Error, and G. A. Maxwell is Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in the said Writ of Error mentioned, should not be corrected, and why speedy judgment should not be done to the parties in that behalf.

Witness the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee, this the 10th day of May, in the year of our Lord, One Thousand Nine Hundred and Thirteen.

M. M. NEIL,
Chief Justice of Supreme Court of Tennessee.

Copy of the within citation received this the 13th day of May, 1913, and accept service of the above notice or citation.

This May 13, 1913.

G. A. MAXWELL,
By ADCOCK & ADCOCK, *Att'ys.*

9 In the Supreme Court of the State of Tennessee.

LOUISVILLE & NASHVILLE RAILROAD CO.
VS.
G. A. MAXWELL.

Know all men by these presents, That we, The Louisville & Nashville Railroad Company as Principal, and Ed T. Seay and Jno. B. Keeble, Sureties, are held and firmly bound unto G. A. Maxwell, in the sum of Two Hundred and fifty Dollars, to be paid to said obligee, his successor, representatives, and assigns, to the payment of

which well and truly to be made, we bind ourselves, our heirs and representatives and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this the 5 day of April, A D. 1913.

Whereas, the above named Plaintiff in Error, hath prosecuted a Writ of Error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Tennessee:

Now, therefore, the condition of this obligation is such that if the above named Plaintiff in Error shall prosecute its said writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

10 LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By ED T. SEAY, *Att'y.*
JNO. B. KEEBLE,
ED T. SEAY,
Sureties.

STATE OF TENNESSEE,
County of Davidson:

On this the 5 day of April, 1913, before me, personally appeared Ed T. Seay, to me personally known, and acknowledged that the said instrument was signed on behalf of the Louisville & Nashville Railroad Company by him, as its attorney with authority so to do, and that he executed the foregoing bond and acknowledged the same as his free act and deed, and the free act and deed of the said corporation.

ED T. SEAY.

Sworn to & subscribed before me, April 5, 1913.
M. M. NEIL, *C. J.*

I hereby approve the foregoing bond and sureties, this the 5th day of April, A. D. 1913.

M. M. NEIL,
Chief Justice of the Supreme Court of the State of Tennessee.

11 In the Supreme Court of the State of Tennessee.

LOUISVILLE & NASHVILLE RAILROAD CO.
vs.
G. A. MAXWELL.

The Louisville & Nashville Railroad Company, in conjunction with its petition for a Writ of Error herein, makes the following Assignments of Error which it avers occurs in the final order and judgment herein, dated the 29th day of March, 1913, as follows, to-wit:

I.

The Supreme Court of the State of Tennessee erred in holding that the Plaintiff, Louisville & Nashville Railroad Company was not entitled to recover against the Defendant G. A. Maxwell, the sum of $58.30, the amount of an undercharge sued on in this cause, and in holding that under the Act of 1887, known as the "Interstate Commerce Commission Act," and amendments thereto, said Railroad Company was precluded from recovering in this cause; and in holding that the act of the Louisville & Nashville Railroad Company in selling said tickets at the price of $49.50 each, instead of $78.65 each, did not amount to a discrimination.

II.

The Supreme Court of the State of Tennessee, erred in holding that the Plaintiff, Louisville & Nashville Railroad Company
12 was not entitled to recover the sum of $58.30 against the Defendant G. A. Maxwell, the amount of undercharge on two tickets from Nashville, Tennessee, to Salt Lake City, and return, and in holding that it would be unfair and unjust to Defendant Maxwell to require him to pay the regular tariff rate because of the error of the Railroad Company in the routing, when he received no advantage therefrom, it appearing from the admitted facts in the case, and as found by the Court of Civil Appeals and the Supreme Court, that at the time the Defendant Maxwell went to purchase the two tickets, he stated to the Agent of the Railroad Company that he wanted to go by Chicago and Denver, and return by Stanford, Texas; and that the rate charged Maxwell for said tickets was below the published tariff rates which the Railroad Company had filed with the Interstate Commerce Commission.

The Supreme Court of the State of Tennessee, which is the highest Court in said State in which a decision in this suit could be had, where was drawn in question the right of the Louisville & Nashville Railroad Company to recover of the Defendant G. A. Maxwell, the sum of $58.30, the amount of an undercharge on two tickets purchased by the Defendant of the Plaintiff for an interstate journey, the said amount of $58.30 being that much less than the published tariff rates which said railroad had made and filed with the Interstate Commerce Commission, and being a determination in favor of G. A. Maxwell and it being the duty of the Railroad Company, under the Act of Congress of 1887, known as the "Interstate Commerce Act" and amendments thereto, as well as by the rulings of the Interstate Commerce Commission in such cases,
13 to collect said amount, and said Supreme Court rendered judgment against the right specially set up and claimed by the Louisville & Nashville Railroad Company under said Acts of Congress.

The Louisville & Nashville Railroad Company prays that a Writ of Error from the Supreme Court of the United States may issue to the Supreme Court of the State of Tennessee, and further prays

hat the Supreme Court of the United States will reverse the said nal order and judgment of the Supreme Court of the State of Tenssee; and that said Louisville & Nashville Railroad Company may ave and recover of the Defendant G. A. Maxwell, the sum of $58.30, e amount of said undercharge, together with all of the costs of the ause, and may have any further and other relief as may be proper nd just.

Dated this 5th day of April, 1913.

ED T. SEAY,
JNO. B. KEEBLE,
Attorneys for Louisville & Nashville Railroad Co.

In the Supreme Court of the State of Tennessee.

Filed April 12, 1913. Joe J. Roach, Clerk.

LOUISVILLE & NASHVILLE RAILROAD CO.
vs.
G. A. MAXWELL.

o J. J. Roach, Clerk of the Supreme Court of the State of Tennessee:

Pursuant to Paragraphs 1 and 2 of Rule 8 of the Rules of the upreme Court of the United States, promulgated Dec. 22, 1911, I ereby indicate to you the portions of the record to be incorporated to the transcript of record to be sent up to the Supreme Court of e United States on Writ of Error from the Supreme Court of the nited States to the Supreme Court of the State of Tennessee in e above entitled cause.

1. The original transcript of the record from the Circuit Court of itnam County, Tennessee, to the Court of Civil Appeals, filed in ur office Aug. 12, 1912, omitting Assignments of Error, brief id argument of the parties in the Court of Civil Appeals.

2. The opinion of the Court of Civil Appeals filed in said cause, gether with the judgment of said Court.

3. The memorandum opinion of the Supreme Court of the State Tennessee, together with the minute entries of said Court in the ove entitled cause.

ED T. SEAY,
Attorney for Louisville and Nashville Railroad Co.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
G. A. MAXWELL.

We acknowledge service of the within notice.
This April 11th, 1913.

ADCOCK & ADCOCK,
Attorneys for Def't, G. A. Maxwell.

16 *Magistrate's Warrant.*

STATE OF TENNESSEE,
Putnam County:

To any lawful officer in said County:

You are hereby commanced to summon Garrett A. Maxwell to personally appear before me, or some other acting Justice of the Peace of said County, to answer the complaint of Louisville & Nashville Railroad Co., in a plea of debt due by Acct. under $250.00.

Given under my hand and seal this 10 day of April, 1911.

J. R. DOUGLASS,
Justice of the Peace.

(On back:) Louisville & Nashville R. R. Co., Plaintiff, vs. Garrett A. Maxwell, Defendant. Magistrate's Warrant. (Civil) No. 762. Issued 10 day of April, 1911. J. R. Douglass, J. P.

Came to hand same day issued and executed by reading the within warrant to Garrett A. Maxwell, and citing him to appear before John Dowell, Justice of the Peace, for trial the 12 day of April, 1911, at 1 o'clock P. M.

A. L. WEEKS, *Sheriff.*

LOUISVILLE & NASHVILLE R. R. Co.
VS.
GARRETT A. MAXWELL.

Judgment for the defendant against the plaintiff for all cost, for which execution may issue.

Appeal prayed and granted to Circuit Court of Putnam County. This the 12 day of April, 1911.

J. H. DOWELL, *J. P.*

17 Filed April 12, 1911. R. E. L. Proffit, Clerk.

Appeal Bond.

STATE OF TENNESSEE,
Putnam County:

We, Louisville and Nashville, R. R. Co. principal, and A. Algood and Thomas Finley acknowledge ourselves indebted to Garrett A. Maxwell in the sum of Two Hundred and Fifty Dollars to be void if Louisville & Nashville R. R. Co., who has this day appealed to the next term of the Court of the Circuit Court for said County, from a judgment of J. H. Dowell, a Justice of said County in favor of said Garrett A. Maxwell against said L. & N. R. R. Co., for all the costs

all prosecute said appeal successfully, or in case of failure shall mply with and perform the judgment of said Court.
This 12th day of April 1911.

LOUISVILLE & NASHVILLE
R. R. CO.,
By THOS. FINLEY, *Att'y.*
THOS. FINLEY, *Security.*
A. ALGOOD, *Security.*

Filed Apr. 12, 1911. J. H. Dowell, J. P.

STATE OF TENNESSEE,
Putnam County:

Be it remembered that at a Circuit Court of the Fifth Judicial rcuit of said State, began and held in and for said County, at Court house in the town of Cookeville on the Fourth Monday July, it being the twenty-fourth day of said month, in the year our Lord One Thousand Nine Hundred and Eleven, and of the dependence of the United States the One Hundred and Thirty th year, present and presiding the Honorable C. E. Snodgrass, dge, etc., when the following proceedings were had and entered record, to-wit:

Monday morning July 31, 1911, Court met pursuant to adjournnt; present and presiding the Honorable C. E. Snodgrass, Judge, , when the folowing proceedings were had and entered of record, vit:

LOUISVILLE & NASHVILLE R. R. Co.
vs.
G. A. MAXWELL.

Appeal.

This case is continued until the next term of this Court upon application of plaintiff and on its paying the cost of the present n of the Court, and pending this motion the defendant withdrew exceptions heretofore made to the deposition of R. D. Pusey, and hereby agrees that said deposition be read as evidence for the plaintiff without objection except for incompetency of the testimony.

TE OF TENNESSEE,
Putnam County:

Be it remembered that at a Circuit Court of the Fifth Judicial uit of said, — began and held in and for said County, at the rt house in the Town of Cookeville, on the Fourth Monday in ember, it being the twenty seventh day of said month in the of our Lord One Thousand Nine Hundred and eleven, and he Independence of the United States the One Hundred and rty Sixth year, present and presiding the Honorable C. E.

Snodgrass, Judge, Etc., when the following proceedings were had and entered of record, to-wit:

Friday morning December 8, 1911, Court met pursuant to adjournment, present and presiding the Honorable C. E. Snodgrass, Judge, etc., when the following proceedings were had and entered of record, to-wit:

20 LOUISVILLE & NASHVILLE R. R. Co.
vs.
G. A. MAXWELL.

Appeal No. 9.

The plaintiff comes by its attorney and moves the Court to be allowed to amend the warrant in this case by averring that an undercharge which was made on two passenger tickets sold to defendant in June 1910, entitling the parties to travel from Nashville, Tennessee to Salt Lake City and return, contrary to the interstate commerce act and the published tariff rate at that time, which motion being seen and understood by the Court is allowed, and it is so ordered by the Court.

L. & N. R. R. Co.
vs.
G. A. MAXWELL.

Appeal No. 9.

This cause came on to be heard before the Honorable C. E. Snodgrass, Judge, Etc., upon the pleadings, proof and entire record in the case, when the Court took the case under advisement until the next term of the Court.

Thereupon the Court continued the case until the next term for decision.

21 STATE OF TENNESSEE,
Putnam County:

Be it remembered that at a Circuit Court of the Fifth Judicial Circuit of said State, begin and held in and for said County, at the Court house in the Town of Cookeville, on the Fourth Monday in March, it being the twenty fifth day of said month in the year of our Lord One Thousand Nine Hundred and Twelve, and of the Independence of the United States, the One Hundred and Thirty Sixth Year, present and presiding the Honorable C. E. Snodgrass, Judge, etc., when the following proceedings were had and entered of record, to-wit:

Thursday morning April 11, 1912, Court met pursuant to adjournment, present and presiding the Honorable C. E. Snodgrass, Judge, etc., when the following proceedings were had and entered of record, to-wit:

22 L. & N. R. R. Co.
vs.
G. A. MAXWELL.

Appeal No. 7.

Judgment.

This cause came on this day to be heard before the Honorable C. E. Snodgrass, Judge &c., without the intervention of a Jury, this being a non Jury case, upon the pleadings, Depositions, and exhibits thereto, and the oral proof introduced on the trial of the case, and the entire record in the case from all of which the Court finds the issues in favor of the defendant.

It is therefore ordered and adjudged by the Court that plaintiff's suit be dismissed, and that the defendant have and recover of the plaintiff all the costs of this cause for which execution may issue.

The plaintiff then moved the Court for a new trial, which motion the Court overruled.

The plaintiff comes by its attorneys and moves the Court to grant it a new trial upon the following grounds, to-wit:

(1)

Because there is no evidence to sustain the judgment of the Court in this case.

(2)

Because the Court erred in dismissing plaintiff's suit in this case and taxing it with the costs.

ALGOOD & FINLEY,
Att'ys for Plaintiff.

Filed April 11, 1912. R. E. L. Proffitt, Clerk.

23 The foregoing motion for a new trial being seen and understood by the Court, is overruled, and to this action of the Court in overruling said motion for a new trial the plaintiff excepts.

To all of which action of the Court in dismissing plaintiff's suit and taxing it with all the costs, and in overruling its motion for a new trial in this case, the plaintiff excepts and prays an appeal in the nature of a writ of error, to the next term of the Court of Civil Appeals at Nashville, Tennessee, which to it is granted upon the execution of bond as required by law, and upon motion of plaintiff it is allowed thirty days from the rise of this Court in which to file said appeal bond and prepare and have signed by the Court and file with the Clerk a bill of exceptions.

Upon motion of plaintiff it is ordered by the Court that the original exhibits to the deposition on file in this case be sent up by the Clerk, instead of sending up copies of said exhibits.

24 *Bill of Exceptions.*

In the Circuit Court at Cookeville, Tenn.

L. & N. R. R. Co.
vs.
G. A. Maxwell.

On the trial of this case the following proceedings were had, and the following evidence introduced before the Court.

The plaintiff read in evidence the deposition of R. D. Pussy, filed in this case for the plaintiff July the 24th, 1911, and marked exhibit "A" to this bill of Exceptions together with exhibits to said deposition, which deposition and the certificate thereto and the endorsements thereon, are in the words and figures following, to-wit:

In the Circuit Court, Putnam County, Tenn.

Louisville & Nashville Railroad Company
vs.
G. A. Maxwell.

Deposition of R. D. Pusy.

Witness for plaintiff in the above cause, taken pursuant to agreement hereto attached on Friday, July 14, 1911, at Louisville, Kentucky, in the presence of W. A. Northcutt, attorney for plaintiff.

The said witness, R. D. Pusey, aged thirty seven, being first duly sworn, deposed as follows:

25 By Mr. Northcutt:

Q. Mr. Pusey, state your residence and occupation.

A. Louisville, Kentucky, at present, assistant General passenger agent.

Q. Of the Louisville & Nashville Railroad Company,

A. Yes, sir.

Q. Are your duties in that position such as to make you familiar with the rates charged by that Company and its connections for passenger travel from and to points on the line of the Louisville & Nashville railroad and points on the lines of other railroads in the United States.

A. Yes sir.

Q. Are you familiar with the conditions under which such tickets may be sold? That is, as to the routes a passenger may travel in making such trips?

A. Yes sir.

Q. In this case, the agent of this Company at Nashville, Tennessee, sold to Mr. G. A. Maxwell, on or about October 13, 1910 two tickets from Nashville, to Salt Lake City, Utah, and return, routed

y way of Chicago and Denver to Salt Lake on the going part of the ourney, and on the return part journey via Denver, Amarillo Texas, hence to Fort Worth Texas, thence to Memphis, thence to Nashville, nd charged for the tickets routed in that way $49.50 each. Was he correct rate charged for tickets routed in that way? And if not, hat was the correct rate?

A. The correct rate was not charged, and there was no tariff nam-ng a round-trip rate by that route. The correct rate would have een a One-way rate from Nashville to Salt Lake $44.90, and from alt Lake to Fort Worth, $36.25, and Fort Worth to Nashville of $21.85. I have stated the rate from Salt Lake to Fort Worth 6 and Fort Worth to Nashville, because the passenger made a stop-over at Fort Worth.

Q. If there was in effect a round-trip rate of $49.50 from Nashville o Salt Lake and return to Nashville, pleace state the route by which hat rate applied, and by which a passenger on a ticket at that rate ould have travelled.

A. A passenger could have traveled at the rate of $49.50 from ashville to Salt Lake and return, going and returning through hicago and Denver, going and returning through St. Louis and enver, going and returning through Memphis and Denver; or, he uld have traveled at that rate going through St. Louis and Denver, nd returning through Denver, Amarillo, Texas, and Memphis, or e reverse of that route.

Q. Could a passenger holding a ticket purchased at the rate of 49.50 have made the trip going via Chicago and returning by nother route than the one he used in going to Salt Lake?

A. No sir.

Q. There was no variable route, then, in connection with Chicago?

A. Not at $49.50.

Q. Was there, then, a variable route that could have been used in lling a round trip ticket from Nashville to Salt Lake by way of hicago at some other rate than the $49.50? If so, please state what e rate was, and the route, by which a passenger could have traveled such a ticket?

A. A passenger could have purchased a ticket at the rate of $53.60, aveling through Chicago and Denver on the going trip and return-g through Denver, Amarillo and Memphis, or through Denver and . Louis on the return trip; or the reverse of those routes.

Q. Would a passenger on such a ticket, in traveling from Amarillo to Memphis, have the right to go by way of Fort Worth or would he have to go direct from Amarillo to Mem-is?

A. He would have to go direct from Amarillo to Memphis, and not Fort Worth.

Q. If you have in your possession the tariff naming the round p rates of $49.50 and $53.60, concerning which you have just tified, will you please file it and make it a part of your testimony, d also indicate the places in the tariff where the rates may be found, d the provisions in the tariff naming the routes over which the es in question apply?

A. Yes sir. The tariff, I. C. C. No. F-1299 names the rate of $49.50 going and returning the same route. Pages 169 and 170 of this tariff show the rate of $49.50, and also the routes by which it is applicable.

Q. That tariff, as I understand, provides for a rate of $49.50 from Nashville to Salt Lake and return, going and returning by the same route?

A. Yes sir.

Q. Now state the rates for the diverse or variable routes, where they are shown.

A. Those rates are shown in tariff I. C. C. No. F-1297. On page 30, it shows the round-trip fare to Salt Lake City by adding $13. to fares published in the tariff to Denver, Colorado. On pages 72 and 73, it shows the rate from Nashville, to Denver and return of $36.50, by certain specified routes, and a rate of $40.60 by other specified routes. This would make the rate of $49.50 or $53.60, according to the route used.

28 Q. The last named rates are to Salt Lake, I understand?

A. Yes.

Q. And where are those routes shown in that Tariff? On what page?

A. Page 72; routes 1 to 14 inclusive.

Q. Those routes are the ones you have just testified that a passenger could have used on that $49.50—or the $53.60 ticket?

A. Yes sir.

Q. Will you please file those two tariffs as exhibits with your testimony, marking them Exhibits Pusey—Nos. 1 and 2, respectively?

A. Yes sir, I will.

Q. You testified, Mr. Pusey, that the $49.50 rate did not apply by the route that Mr. Maxwell actually used in making his trip from Nashville to Salt Lake and return, but that the correct tariff rates from the routes used by him were the full one-way rates from Nashville to Salt Lake by Chicago, and the full one way rate from Salt Lake by Amarillo, by Fort Worth and Memphis to Nashville, the total, I believe, being $103. Could Mr. Maxwell, by purchasing the $53.60 ticket,—which I understand, could have been routed by Chicago and Denver to Salt Lake, and returning by Denver, Amarillo and Memphis to Nashville,—have made the trip he actually did make at an expenditure of a less amount of money than $103? If so, state how that could have been done.

A. He could have purchased a ticket at the rate of $53.60 from Nashville to Salt Lake and return, traveling on the going trip through Chicago and Denver, and on the return trip through Denver to Amarillo Texas, and direct to Memphis, and on his arrival

29 at Amarillo purchased a ticket from Amarillo to Fort Worth for $10.10, and from Fort Worth to Memphis for $14.95, and used the round-trip ticket from Memphis to Nashville, at a total cost of $78.65 for the ticket.

Q. And on that basis for the two tickets, what would he have paid over and above what he actually paid for the two tickets that were furnished?

A. If he has made the trip in this way, it would have cost $58.30 for the two tickets more than he actually paid for the two tickets which he actually used on the trip.

Q. If you have the tariffs showing the rate of $10.10 from Amarillo to Fort Worth and $14.95 from Fort Worth to Memphis, please file them as Exhibits Pusey,—Nos. 3 and 4, respectively, and make them a part of your testimony.

A. I have not the tariff giving the rate from Amarillo to Fort Worth. The tariff is Forth Worth & Denver City Railway issue, bearing I. C. C. Number 522. I will telegraph for a copy of this tariff, and will file as soon as received. The fare from Fort Worth to Memphis is published on page 267 of Tariff I. C. C. No. 76, which is filed with this deposition as requested.

R. D. PUSEY.

STATE OF KENTUCKY,
County of Jefferson, sct.

I certify that being a stenographer, I took the foregoing deposition in the exact language of the witness, and reduced it to typewriting, that it was then read over by the witness, in my presence, and approved and signed by him; and I also certify that I am not in any capacity in the regular employ of the party in whose behalf this deposition is taken, nor in the regular employ of his attorney; and I certify that I am not interested in the case, nor of kin or counsel to either of the parties, and that I sealed up said deposition, and put it in the Express Office, at Louisville, Kentucky, without its being out of my possession or altered after it was taken.

Given under my hand and seal this 21st day of July, 1911.

J. G. McLEAN,
Notary Public, Jefferson County, Ky.

[J. G. McLean, Notary Public, Jefferson County, Ky.]

My Commission expires March 7, 1914.

Filed July 24, 1911. R. E. L. Proffitt, Clerk.

L. & N. R. R. Co.
vs.
G. A. MAXWELL.

The undersigned hereby agrees to waive notice of taking of the deposition of R. D. Pusey, assistant General Passenger Agent of the plaintiff, and agree that the same may be taken in the City of Louisville, Ky., on July 14th, 1911, and also it is agreed that the depositions of W. H. Mustaine and R. C. Wallis may be taken in Nashville, Tennessee, on July 19th, 1911, without other or further notice than this agreement.

This July 10, 1911.

B. G. ALCOCK,
Attorney for Defendant.

The defendant excepts to the foregoing deposition because th certificate of the Notary Public fails to show the date of the co mencement of the commission under which he claims to have act in taking said deposition.

Shannon's Code 3197.

(2) Because there is no Jurat to the deposition showing that th witness was sworn.

B. G. ADCOCK, *Att'y.*

Exceptions sustained.

R. E. L. PROFFIT, *Clerk.*

Plaintiff appealed to the Court from the foregoing exception July 29, 1911.

THOS. FINLEY,
Att'y for Plaintiff.

32 Exhibit "A" to the Bill of Exceptions in this case.

C. E. SNODGRASS, *Judge.*

The Court ordered that the original exhibits to said deposition b sent up with the transcript in this case as appears on the minutes o the Court April 11, 1912.

The plaintiff here closed its proof.

Defendant's Evidence.

G. A. MAXWELL, the defendant in this case, being duly sworn testified as follows:

In January 1910 I went to the ticket office of the L. & N. R. R. Co. at Nashville, Tennessee, and made inquiry as to rates on round trip tickets to Salt Lake City, Utah, and the Agent stated that there wa not any special rates on at that time, and thourgh that there would not be any special rate before May the 1st, or June the 1st, and I stated to them at that time that I would like to go one route and come another, and they stated to me that I could not do this, that I would have to go and come the same route. I called on them several differ ent times before this rate went into effect in order to know if they knew anything more about when this rate would go into effect, and they stated to me repeatedly that I would have to go and come the same way, but never did explain the reason why. And about the first of May of this same year, they notified me, that the rate would go into effect June the 1st and that the rate would be $49.50

33 for the actual R. R. fare from Nashville, Tenn. to Salt Lake City, Utah, and return to Nashville, Tenn. Shortly after this during the month of May, I was on the train one day between Cookeville, Tenn., and Monterey, Tenn., and met up with one W. V. Davidson, who had a furniture store at that time in Denver Col. and the subject was sprung by one of us in regard to making this trip, and Mr. Davidson said to me, what route are you going? I told him that

COPY BOUND

we were going through St. Louis, that my wife had a brother in Stamford, Texas, that she had not seen for several years and that the R. R. had stated to me that this was the best route. Mr. Davidson asked me why not come back by St. Louis? I told him that the R. R. people said that I would have to go and come the same route, and they thought St. Louis was the best route. Mr. Davidson stated to me, that he and his wife were going to Denver on June the 1st, and that they always went over the L. & N. through Chicago, as he got much better accomodations over that route, I stated to him that we would be delighted to make the trip with them, but the L. & N. authorities had repeatedly stated to me that I would have to go and come the same route. He said he certainly did not understand a proposition of this kind and that he would be glad to take the matter up with the L. & N. authorities when he got back to Nashville and see if they could not arrange for us to go via Chicago with them and return over some other road. In a few days after Mr. Davidson went to Nashville, I received a letter from Mr. Wallace, one of the L. & N. authorities, stating that Mr. Davidson had called in my behalf in regard to making this trip with them, and as stated above, and he Mr. Wallace, stated in his letter that he was glad to inform me, that we could make the trip one way and return the other, or vise
34 versa, as I desired, or words to that effect, I wrote Mr. Wallace immediately upon receipt of his letter, that we preferred going through Chicago, but did not state to him what route we preferred to return over, as it was immaterial to us what way we were routed back, Mr. Davidson met us in the L. & N. ticket office in Nashville and stated that he had made arrangements for our reservation and Pullman fare, and when I purchased the R. R. tickets, from their ticket agent I stated to them that we wanted to go through Denver via Chicago, to Salt Lake City, Utah, and from Salt Lake City to Stamford, Texas. Now these are all the points that we asked to go to. When the tickets were made out, or I suppose that you might call it an order for the tickets stating the stop overs at different points along the way they routed us, I paid no further attention to the tickets after I bought them and thought no more about it. We arrived in Chicago the following morning after leaving Nashville. Mr. Davidson stated to me in the ticket office in Chicago, that we would either have to have our tickets fixed or get our tickets, I don't remember just which he said and we went to the ticket Agent, I turned him in our tickets and he made out two new tickets copying the exact words on the one, I supposed that I gave him, naming the same route and stop overs as I suppose that was on the other tickets. He was some time doing this, as I know I got very impatient before he got through and it was after this that I noticed that we were routed back through Memphis, Tenn., and as I have stated above, that we only mentioned Chicago, in this trip, Denver, Salt Lake City, and Stamford, Texas, and they took my money for these tickets without any hesitation, and I never dreamed that there would ever be any trouble in re-
35 gard to this matter, or even thought of such a thing. These tickets were good from June the 1st till the latter days of September or October. We made the round trip getting back home

CLOSE IN CENTER

in the month of June, I heard nothing more in regard to the trip from the R. R. Company till sometime in October of the same year, as I remember it, when the L & N. R. R. authorities sent their agent to see me and said that they had made a mistake on our tickets and that we had not paid them enough money and I stated to him that we had paid to them the published rate and he stated to me, that he thought they had routed us wrong and I told him that I was not to blame for that, as I had told the agent the points that we wanted to make and they certainly made the routing themselves with the exception of the four points that I have stated above, and that I certainly would not pay them any more money unless the law said so. As I remember, he stated "I don't blame you." Now they routed us via Wichita Falls, Texas, as they thought that was the best way to get to Stamford, Texas, which is more than 100 miles from Stamford, and we changed cars there and had to pay our fare to Stamford and back in order to get on the main line that our tickets called for to get home.

The amount of money I paid $49.50 for each ticket was their published rate, through and return by the same gateway.

$24.30 was all they claimed when they were writing me stating that they had made a mistake in routing me. I bought two tickets one for my wife and one for myself.

This was all the evidence introduced on the trial of this case.

36 The Court dismissed plaintiff's suit and taxed it with all costs, as shown by proper entry on the minutes of this Court.

The plaintiff moved the Court for a new trial, because there was no evidence to support the judgment of the Court, &c., as shown by an entry on the minutes of this Court, but the Court overruled said motion as shown by an entry on the minutes of the Court, and the Plaintiff then and there excepted. The plaintiff thereupon prayed an appeal in the nature of a writ of error to the next term of the Court of Civil Appeals at Nashville, Tennessee, which was granted, as shown by an order on the minutes of this Court.

37 *Motion for New Trial.*

The plaintiff comes by its attorney and moves the Court to grant it a new trial upon the following grounds, to-wit:

(1)

Because there is no evidence to sustain the Judgment of the Court in this case.

(2)

Because the Court erred in dismissing plaintiff's suit in this case and taxing it with the costs.

ALGOOD AND FINLEY,
Attorneys for Defendant.

Filed April 11, 1912. R. E. L. Proffitt, Clerk.

Thereupon, the plaintiff tenders this, its Bill of Exceptions, which is signed, filed and made a part of the record in this case.

This the 27th day of April, 1912.

C. E. SNODGRASS, *Judge, &c.*

Filed April the 27th, 1912. R. E. L. Proffitt, Clerk.

38 *Appeal Bond.*

We, Louisville & Nashville Railroad Company, Principal, and A. Algood and Thos. Finley, sureties, acknowledge themselves indebted to G. A. Maxwell, in the penal sum of Two Hundred and Fifty Dollars.

The conditions of the above obligation are as follows:

Whereas, the said G. A. Maxwell, on the 11th day of April, 1912, in the Circuit Court of Putnam County, in the case of L. & N. R. R. Co., vs. G. A. Maxwell, recovered a judgment against the L. & N. R. R. Co., for all cost of said case; and said L. & N. R. R. Co. has prayed and obtained an appeal, in the nature of a writ of error, from the said judgment to the next term of the Court of Civil Appeals of Tennessee, to be held at Nashville, Tennessee, on the first Monday in October, 1912.

Now if the said L. & N. R. R. Co. shall effectually prosecute said appeal, or failing therein shall pay the damages and all costs, this obligation shall be void; otherwise remain in full force and effect.

This the 29th day of April, 1912.

LOUISVILLE & NASHVILLE R. R. CO.,
By THOS. FINLEY,
THOS. FINLEY, *Sec.*
A. ALGOOD, *Sec.*

Filed April 29th, 1912. R. E. L. Proffitt, Clerk.

39 From Putnam.

Filed Oct. 14, 1912. J. J. Roach, Supreme Court Clerk.

LOUISVILLE & NASHVILLE RAILROAD CO.
vs.
G. A. MAXWELL.

Opinion.

Plaintiff in error, Louisville & Nashville Railroad Company brought this suit before a justice of the peace of Putnam County to recover an amount alleged to be due it as a balance on two passenger tickets from Nashville, Tennessee, to Salt Lake City, Utah, and return, sold by its agent at Nashville to defendant in error, G. A. Madwell, the claim of the railroad company being that the tickets were sold for less than the law regulating interstate transportation permits and that the defendant is indebted to it for the difference between the

price at which the tickets were sold and the minimum fixed by law. The case was decided against the railroad company by the justice of the peace before whom it was tried, and in the circuit court to which it was carried by appeal, and the case is before this court on appeal by the railroad company from the judgment of the circuit court, and assignments of error.

While there are four separate assignments of error they raise but one question which is a question of law. That question, stated in its briefest terms, is this: Is a passenger who has purchased and used a ticket or tickets over the line of a common carrier, or of connected lines, engaged in interstate transportation, and subject to and
40 controlled by the interstate Commerce Act of 1887, with its amendments, and which ticket or tickets were routed over or into portions of different states, liable to the carrier selling the ticket or tickets, for the difference between the amount paid therefor and the minimum fixed by law, when, by mistake, they were sold at less than such minimum?

The essential and controlling facts are few and undisputed. They are these: Defendant in error, G. A. Maxwell, after repeatedly seeing and talking with the agents or representatives of the Louisville & Nashville Railroad Company at Nashville, Tennessee, in regard to rates on round trip tickets to Salt Lake City Utah, and return, and after receiving a letter from the railroad company in regard thereto and answering that letter, all of which matters occurred between Jan. 1910 and June of that year, on or about the first of the last named month purchased two passenger tickets from Nashville, Tennessee, to Salt Lake City, by way of Chicago, Ill., Denver, Col., and routed to return by Denver, Col., Amarillo and Fort Worth, Texas, and Memphis, Tennessee, and paid for each ticket the sum of $49.50. There were at that time published rates under the provisions of the Interstate Commerce Act by which fares over the route actually traveled going and coming aggregated $78.65, each or $29.15 each more than was charged and collected therefor, making a difference of $58.30 between the amount paid by Mr. Maxwell for the tickets in question and the amount that should have been charged and collected. Mr. Maxwell was informed when he first made inquiry about the tickets in January that there were no special rate tickets at that time, but likely would be by May or June 1st. He then, and on several occasions thereafter, made known his desire to go to Salt Lake City by one route and return by another, and was told that he
41 could not be furnished reduced rates except by going and coming over the same route, but after repeated inquiries and the correspondence referred to he was informed that he could make the trip on reduced rates one way and return another; and when he went finally to purchase the two tickets he stated to the agent that he wanted to go by way of Chicago and Denver and return by way of Stanford, Texas, and was given the tickets routed as hereinbefore noted, at the rates mentioned. At that time he in fact could have gone to Salt Lake City at the rate which he paid, but over other routes, going and returning through Chicago and Denver, or through St. Louis and Denver, or through Memphis and Denver, or going

through St. Louis and Denver and returning through Denver, Amarillo and Memphis.

Mr. Maxwell was in no way at fault in the matter. He did no more than tell the agent the points to which he wished to go and make it known that he did not wish to go and return by the same route. The agent fixed the routing in the tickets and named the fare, and Maxwell paid without further question.

Counsel for plaintiff in error, in support of the contention that it can collect the $58.30 cite and rely on a number of cases, among which is that of Texas & Pacific Railway Co. vs. Mugg, 202, U. S., 242. An examination of that case shows that a shipper was quoted a rate on interstate shipments, and made the shipments accordingly, the shipments consisting of coal, but was forced thereafter, to his loss and without his fault, to pay a higher rate because of the Interstate Commerce Act. The Supreme Court of the United States said, quoting with approval the language of the Supreme Court of Alabama in Southern Ry. Co. vs. Harrison, 119, Ala. 539, which last
42 named case had followed the case of Railroad Co. vs. Hefley 158 U. S. 98, "The clear effect of the decision (in the Hefley case) was to declare that one who has obtained from a common carrier transportation of goods from one State to another at a rate, specified in the bill of lading, less than the published schedule rates filed with and approved by the Interstate Commerce Commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges; in other words, that whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods, only by the payment or tender of payment, of such amount. Such is now the supreme law, and by it this and the courts of all other States are bound."

The only differences between the Mugg case and the case at bar that could distinguish the two, so far as we see, is, first, that in that case the question arose over freight shipments, while in the case at bar the question involves the carrying of passengers; and, second, in that case the goods were still in the possession of the carrier at the time the extra charge was made, but at the point of destination, having already been shipped, and it was held the carrier had a lien on them by force of the Act of Congress, for the amount fixed by the published schedule of rates, and this he was forced to pay to get the goods, and the suit was brought by the shipper to recover the
43 extra payment.

For the purpose of ascertaining whether or not these matters of difference are sufficient to work a different result, and for the further purpose of considering some questions raised in the reply brief in the instant case, we will here refer to the Interstate Commerce Act. In Judson on Interstate Commerce (2nd ed.), published in 1912, and beginning on page 395 of that work is set out section

six of the Interstate Commerce Act of 1887 as amended in 1889, 1906 and 1910. This section of the Interstate Commerce Act, which is the one applicable to the case at bar, as it now stands after the amendments referred to, contains the following pertinent provisions: After requiring common carriers of interstate commerce to file with the Interstate Commerce Commission a printed copy and keep open to public inspection schedules showing all rates, fares, and charges for transportation between different points on its own route and between points on its route and the route of any other carrier, and after requiring that such schedules "shall plainly state the places between which property and passengers will be carried," and requiring copies of such schedules posted in two public and conspicuous places in every depot where passengers or freight are received, and after making other provisions not necessary to here notice, contains the following:

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or dif-
44 ferent compensation for such transportation of passengers or property or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. * * *

"If any common carrier subject to the provisions of this Act, after written request made upon the agent of such carrier hereinafter in this section referred to, and any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedule or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission or in consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher that (than) the rate over another available line or route, or through entering into any sale or other contract where under such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

It will be seen that the requirements as to filing and publishing of rates, fares and charges apply equally to transportation of
45 passengers or property, and that the prohibition against demanding or collecting or receiving by interstate carriers of less

different compensation than that specified in the tariff filed and in ect at the time, also applies equally to both, and for this reason we e of opinion that the same rule that applies in cases of shipment of ight applies equally to the sale of tickets and carriers of passengers. Nor do we think the fact that the goods shipped in the Mugg case re still in the hands of the carrier and the lien rested on them at e time the extra amount was collected can affect the question of bility, or existence of a debt or obligation, for the reason that in e absence of a liability or obligation to pay an extra amount there uld be nothing for the security of which a lien could attach. In ier words, the liability exists as the foundation of the lien.

Counsel for defendant in error earnestly insist, however, that to quire Mr. Maxwell, under the circumstances of this case, to pay re than he contracted to pay for the two passenger tickets works injustice and results in the violation of a contract, and urge that ch construction works results so harsh and unreasonable that it nnot be correct. Such is in effect the insistence, though not the act terms; and while, in support of this contention they do not fer to the case of Pond-Decker Lumber Co. vs. Spencer, 86 Fed. 6, that is a case strongly supporting the view taken by defendant in ror's counsel; and that such construction is calculated to work eat hardships there can be no question. In its practical workings is easy to see how the greatest hardships could result. Shippers frequently make contracts buying or selling based in a large measure on freight rates, and it is apparent that contracts might be entered into by sellers based on a freight rate which d been quoted, and the goods so sold shipped to the purchasers, hen in view of what the parties had in mind such transactions were ofitable to the seller, whereas, if they can be made after the shipents had been completed to pay larger freight rates the trans-tions ay not only not be profitable but ruinously unprofitable. The Inrstate Commerce Commission saw this injustice which might be orked by a rigid enforcement of the rule announced and enforced the Mugg case, and, in its annual report made in 1908, called attntion to this matter. Congress thereafter, by the amendment of 10, provided a remedy by imposing a penalty of $250.00 to accrue the United States as stipulated in the portion of the sixth section the Interstate Commerce Act hereinbefore set out.

In the work just quoted from, Judson on Interstate Commerce nd ed.), Sections 307 and 309, the effect of the holding of the upreme Court of the United States in the Mugg case, the substances the report of the Interstate Commerce Commission and the Act of ngrss thereon, and the present state of the law as set out in the llowing language:

"Under this section before its amendment in 1906, it was held by e Supreme Court in Texas Pacific R. Co. vs. Mugg, 202, U. S. 24, d 50 L. Ed. 620, May 24, 1906, reversing the Texas Civil Court of ppeals, 98 Tex. 352, that a carrier could exact the regular rate for inter-state shipment as shown by its published and printed hedule on file with the Interstate Commerce Commission and posted

in the station of the Carrier, although a lower rate had been quoted by the carrier to the shipper and shipped under such lower rate so quoted. The Court said that this was within the principle of
47 the decision of the Hefley case, supra. (158 U. S. 98). It was said by the commission in 17 I. C. C. R. 418, that the published rate governing transportation between two given points, so long as it remains uncanceled, is as fixed and unalterable either by the commission or by the carrier, as if that particular rate had been established by a special act of congress. When regularly published it is no longer the rate imposed upon the carrier, but the rate imposed by law.

"The commission in its annual report, 1908, p. 16, in commenting upon this decision of the supreme court in the Mugg Case, said that the theory of the act was that the shipper could at all times by reference to the schedules ascertain for himself the rate, but that in practice it was quite different, as the tariffs were very voluminous; and that it had been found practically impossible to comply with the literal requirement of the statute as to the posting; that in a great majority of cases the ordinary shipper could not without special experience ascertain for himself from an inspection of the tariffs what the rates are, and he must rely on the statement of the railroad agent, and added:

"The commission feels that to require the shipper to ascertain for himself at his peril the rate imposed upon him an undue burden. The railway should know what its established charges are, and may fairly be required to state in writing, when a written request is made by the shipper, the rate which it has published and maintains in force. We call special attention to this matter as one of immediate and general concern, which discloses the need of an appropriate remedy, and urgently request that a suitable measure be promptly enacted.

"The amendment of 1910 provides for a penalty of $250 to accrue to the United States to be recovered by civil action against
48 the carrier brought by the United States, for any misstatement by the carrier as to the rates whereby the shipper suffers damage. Whether any remedy is available to the shipper for such damages has not been judicially determined. See sec. 308, infra. The commission has ruled (18 I. C. C. R. 299) that it has no power under the Act to award such damages to the shipper.

"Any unpublished rate made by the agent of a carrier, whether through mistake or otherwise, is, therefore, unenforcible by the carrier or shipper; and decisions such as the Pondecker Lumber Co. v. Spencer, 86 Fed. 846 (1898) and certain state decisions sustaining recovery by the shipper in such cases, would seem to be inapplicable under the construction of this section as amended. See Armour Packing Co. vs. U. S., C. C. A. eight- circuit 153, Fed. 18 (1907). * * *

It follows therefore that the published rates are conclusive upon both the carrier and the shipper, that the misrepresentation by the agent of a carrier as to the rates is not binding on a carrier although he is thereby misled to his own injury, 18, I. C. C. R. 299, that is,

shipper is bound by the published rate whatever other remedy he ay have for the misrepresentation."

In a note found on page 402 of the work just quoted from, is ie following:

"It was said in the report of the house committee on interstate id foreign commerce, in reporting the amended bill of 1910, that ie bill does not provide for any redress to the shipper who may ave suffered loss on account of misquotation of the tariff rate, for ie reason that it has so far seemed impracticable to find any method of so doing without opening a loophole for the allowance of secret rebates in such manner as would be practically unprovable in criminal proceedings."

It will be seen that when the attention of Congress was called the great injustice that might result from an enforcement of the ile invoked by the railroad company in the case at bar it deliberately refused to provide any remedy other than that of a penalty be recovered by the United States. Now the very fact that no ther or differenc remedy was provided when the harsh results that he rule might work were being considered shows that it was not he intention of Congress to change or modify that rule except as ndicated.

The matter of granting affirmative relief from such a situation s a matter to be worked out by congress and not by the courts, and, owever harsh and inequitable the results that may follow, the ourts are without power to grant relief. Evidently it was the object f Congress to serve the many though hardships might fall on a ew, and the wisdom of the legislation is not for the courts to determine, but for the proper legislative body.

Another contention made by counsel for defendant in error is hat the act of the agent in selling the two tickets at rates below hose fixed under the Interstate Commerce Act was justified under he holding of the Supreme Court of the United States in Interstate Commerce Commission vs. B. & O. Railroad, 145 U. S. 263, sustaining as valid what is known as "party-rate tickets" by which is neant tickets issued for more than one person; but is one ticket ssued to say ten persons. It was held in the case referred to that he "party-rate ticket" issued at a rate below that fixed under the nterstate Commerce Act was valid. The trouble with the application of that doctrine to the case at bar, however, is that no such ticket was called for or issued to Mr. Maxwell. On the contrary he called for and was given two tickets, one for imself and one for his wife, as is disclosed without controversy. But it is said by his counsel that at least two others, another man nd his wife, purchased tickets at the same time; but there is not he slightest evidence or intimation that any "party-rate ticket" was urchased for the four. It appears rather clearly on the other hand, hat these others did not go the whole route traveled by Mr. Maxrell and his wife. It might here be said also that the "party-rate icket" doctrine involves other and different sections of the Interstate Commerce Act than that involved in this case.

Without further comment, it can be said that the facts of the

case in no way call for an application of the "party-rate ticket" doctrine, but show affirmatively that that doctrine has no application. Further, the undisputed facts show, as already set out, that the tickets sold to Mr. Maxwell were sold at a less rate than those fixed under the Interstate Commerce Act, it being undisputed that the rates had been fixed and published as required by law.

What has been said up to this point has been directed at the existence of the obligation of Mr. Maxwell to pay the $58.30, but there is still another feature of the case to be considered, and that is the right of plaintiff in error to maintain this suit, even though the legal obligation to pay rests on Mr. Maxwell.

It is apparent from what has already been said, that the only ground on which Mr. Maxwell can be held liable is that he was chargeable with notice of the rates fixed under and pursuant
51 to the provisions of the law. The railroad company was not only chargeable with the same notice, but actually had in its possession the facts, and it was its negligence in failing to ascertain and report to Mr. Maxwell the facts and collect from him the proper amount that brought about this whole situation. As a result of this negligence it is not only subject to a penalty in a civil action, as already pointed out, but section ten of the Interstate Commerce Act imposes further penalties and punishments to be meted out in a criminal prosecution.

Should the courts grant relief to one who by his own negligence,—negligence condemned and penalized by law, has placed another who is only constructively in the wrong in the position in which Mr. Maxwell occupies in this case, and where to make out his case he must disclose his own wrongful conduct? We think not. We think this is a case where the courts should leave the parties in the position in which they have placed themselves as it leaves just wrong-doers in many relations of life, and in this we think the case at bar is distinguishable from the Mugg case and all other cases where the question of liability of a shipper by interstate carriers to pay a larger amount than that contracted for was recognized. In all those cases the amounts fixed by law had been paid, and the suits had been brought to recover back the excess over the amounts contracted for. The courts simply refused to grant the relief. Here this court is asked to go to the extent of granting relief to the most active of the two wrong-doers, treating Mr. Maxwell as constructively a wrong-doer, and this in the face of the fact that plaintiff in error in making out its case had to disclose its own violations of law. This is asking more than the law requires courts to do in the ad-
52 ministration of justice.

It results that, while we recognize as correct the construction placed on the Interstate Commerce Act by plaintiff in error's counsel, and the obligation of Mr. Maxwell to pay the balance of $58.30, we hold that plaintiff in error is not in position to invoke the aid the courts in enforcing that obligation, and for this reason and this alone the judgment of the lower court is affirmed with costs.

HUGHES, *Judge.*

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53 STATE OF TENNESSEE:

Be it remembered, That at a Court of Civil Appeals, begun and held at the Capitol in the City of Nashville on the Second Monday of September, 1912, it being the 9th day of September, 1912, neither Judge attending, I adjourned Court until tomorrow morning at Nine o'clock.

JOE J. ROACH, *Clerk.*

Neither Judge attending, I adjourned Court from day to day until Monday, Sept. 16, 1912, at Nine o'clock.

MONDAY, *September* 16, 1912.

Court met pursuant to adjournment, Present the Hon. Judges S. F. Wilson, Jos. C. Higgins, Felix W. Moore, H. Y. Hughes, and Frank P. Hall, when the following proceedings were had and entered of record, to-wit:

Putnam. Law.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
G. A. MAXWELL.

This cause came on to be heard upon a transcript of the record from the Circuit Court of Putnam County, assignments of error, reply brief and argument of counsel; upon consideration whereof the Court is of opinion that in the argument of the Court below there is no error.

It is therefore ordered and adjudged by the Court that
54 the judgment of the Court below be affirmed and that G. A. Maxwell have and recover of the Louisville & Nashville R. R. Co. princ., and Thos. Finley and A. Algood, sureties, all the costs of this cause, for which let fi. fa. issue.

55 In the Supreme Court of Tennessee, December Term, 1912.

Putnam. Law.

Filed Apr. 5/13. J. J. Roach, Clerk.

LOUISVILLE & NASHVILLE RAILROAD CO.
vs.
G. A. MAXWELL.

Memorandum.

The Railroad Company brought this suit before a Justice of the Peace to recover of Maxwell the sum of $58.30, the amount of an undercharge which was made on two passenger tickets sold to him in 1910 entitling Maxwell and wife to travel from Nashville, Ten-

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nessee to Salt Lake City, Utah, and return, the tickets being routed from Nashville to Salt Lake City by way of Chicago, Illinois, Denver, Colorado, and routed to return by Denver, Amarillo, Texas, Ft. Worth, Texas, and Memphis, Tennessee.

The defendant payed for each ticket the sum of $49.50. There were at the time published rates under the provision of the Interstate Commerce Act by which the fares over the routes actually traveled aggregated $78.65 for each ticket, or $58.30 more than was charged and collected by the Railroad Company. It is this latter sum that this suit is brought to recover. The facts are undisputed, and were found by the Court of Civil Appeals to be as follows:

"Defendant in error, G. A. Maxwell, after repeatedly seeing and talking with the agents or representatives of the Louisville
56 & Nashville Railroad Company at Nashville, Tennessee, in regard to rates on round trip tickets to Salt Lake City, Utah, and return, and after receiving a letter from the Railroad Company in regard thereto and answering that letter, all of which matters occurred between January 1910, and June of that year, on or about the first of the last named month, purchased two passenger tickets from Nashville, Tennessee, to Salt Lake City, by way of Chicago, Ill., Denver, Colo., and routed to return by Denver, Colo., Amarillo and Fort Worth, Texas, and Memphis, Tennessee, and paid for each ticket the sum of $49.50.

There were at the time, published rates under the provision of the Interstate Commerce Act by which fares over the route actually traveled, going and coming, aggregated $78.65 each, or $29.15 each more than was charged and collected therefor, making a difference of $58.30 between the amount paid by Mr. Maxwell for the tickets in question, and the amount that should have been charged and collected.

Mr. Maxwell was informed when he first made inquiry about the tickets in January, that there were no special rate tickets at that time, but likely would be by May or June 1st. He then, and on several occasions thereafter, made known his desire to go to Salt City by one route, and return by the other, and was told that he could not be furnished reduced rates except by going and coming over the same route, but after repeated inquiries, and the correspondence referred to, he was informed that he could make the trip on reduced rates one way, and return another; and when he went finally to purchase the two tickets, he stated to the agent that he wanted to go by way of Chicago and Denver, and return by way of Stan-
57 ford, Texas, and was given the tickets routed as hereinbefore noted, at the rates mentioned. At the time, he in fact could have gone to Salt Lake City at the rate which he paid, but over other routes, going and returning through Chicago and Denver, or through St. Louis and Denver, or through Memphis and Denver, or going through St. Louis and Denver and returning through Denver, Amarillo and Memphis.

Mr. Maxwell was in no way at fault in the matter. He did no more than tell the agent the points to which he wished to go, and make it known that he did not wish to go and return by the same

route. The agent fixed the routing in the tickets and named the fare, and Maxwell paid without further question."

The suit has been dismissed by the Justice of the Peace, and the Circuit Court, and their judgments have been affirmed by the Court of Civil Appeals. The Court of Civil Appeals was of opinion that the defendant is liable for the amount claimed under a proper construction of the Inter-state Commerce Act, but it was held by that Court that the Railroad Company was in no position to invoke the aid of the Courts in enforcing such an obligation because it was necessary in order to do so for the Company to show "its own iniquity." That Court applied the familiar principle that where the parties are in pari delicto the law leaves them where it finds them, and will entertain no action or suit by either, even though the defendant has acquired an advantage over the plaintiff which he is thus enabled to retain. While this principle of law is well sustained by authority, and is generally accepted, still, it has a well known exception to the effect that relief will generally be granted against contracts made in contravention of the policy of a public
58 statute. Johnson vs. Cooper, 2 Yerger 523; Rucker vs. Wynne, 2 Head 618.

It cannot be doubted at this time that the purpose of Congress in the passage of the Inter-state Commerce Act was to prevent discrimination by common carriers against shippers and passengers, and that it is immaterial in what way the discrimination should arise. Railway Co. vs. Hefley, 158 U. S. 98; Texas & Pacific Ry. Co. vs. Mugg, 202, U. S. 242; Railway vs. Cotton Oil Co. 204, U. S. 437.

The cases cited firmly establish the proposition that it is beyond the power of the carrier to depart from its published rates in favor of any shipper, and the fact that the lower rate is erroneously quoted to the shipper by the agent of the railroad company does not relieve the shipper from liability to pay the higher published rate; nor can the shipper recover damages of the railroad company for a failure to deliver the goods at the point of destination upon a tender of the quoted rate. Both in the case of Mugg and the case of Hefley, the error in quoting the lower rate was discovered by the carrier before the goods were delivered to the consignee at the point of destination, and the lawful rate was demanded before delivery. The Court held in substance that the carrier's lien attached to the freight for the full sum of the lawfully published rate, and that it was not liable in damages for an unlawful detention of the goods for a refusal to deliver them upon the payment or tender of payment of the lower rate. It is said that to hold otherwise would defect the purpose of Congress in the passage of the Inter-state Commerce Act, and open the door to discrimination.

59 The justness and sufficiency of the reason given by the Court is perfectly apparent. An additional reason may also be assigned to the effect that inasmuch as the contract of carriage was executory only before delivery of the goods to the consignee at the point of destination, and was likewise unlawful for the Court to compel a delivery upon payment or tender of payment of the lower and unlawful rate would be in effect for the Court to decree a violation of the Inter-state Commerce Act.

While this is true, the majority of the Court are of opinion that the principle stated does not control this case, for the reason that Maxwell could have gone to the point of destination, Salt Lake City, one route and have returned another route at the price actually paid for the tickets, and therefore, the mere misrouting of the ticket by the Railroad Company is not a discrimination. In addition, it is unfair and unjust to Mr. Maxwell to require him to pay the larger rate because of the error of the Railroad Company in the routing when he received no advantage therefrom, and was mislead into a course of action through the error of the Company when he would have chosen one of the alternative routes at the price paid.

The facts shown by the Court of Civil Appeals show that *that* he could have gone to Salt Lake City at the price paid over other routes going and returning through Chicago and Denver or going through St. Louis and Denver and returning through Denver, Amarilla and Memphis, either one of which would have met his requirements.

60 Chief Justice Neil and Mr. Justice Green are of opinion that this case cannot be distinguished from Railroad Company vs. Hefley, supra, T. & P. Railway Co. vs. Mugg, supra, and upon that ground they dissent.

LANSDEN, *J.*

61 STATE OF TENNESSEE:

Be it remembered that at a Supreme Court of Errors and Appeals, begun and held at the Capitol, in the City of Nashville, on the First Monday in December, 1912, the same being the second day of December, 1912, neither Judge attending, I adjourned Court until tomorrow morning at nine-thirty o'clock.

JOE J. ROACH, *Clerk.*

Neither Judge attending, I adjourned Court from day to day until Monday, December 9, 1912, at nine thirty o'clock.

JOE J. ROACH, *Clerk.*

MONDAY, *December* 9, 1912.

Court met pursuant to adjournment, present the Honorable Associate Justices M. M. Neil, Grafton Green, D. L. Lansden, and A. S. Buchanan, when the following proceedings were had and entered of record, to-wit:

MARCH 29, 1913.

Putman. Law.

L. & N. R. R. Co.
vs.
R. A. MAXWELL.

This cause came on to be heard upon a transcript of the record from the Circuit Court of Putman County, assignments of error, briefs and argument of counsel to the Court of Civil Appeals, a

petition for certiorari, answer and briefs thereto; upon consideration whereof the court is of opinion that in the judgment of the Court of Civil Appeals there is no error and the same is affirmed.

62 It is therefore ordered and adjudged by the Court that the judgment of the Court of Civil Appeals and that of the Court below be affirmed, and that R. A. Maxwell have and recover of the Louisville & Nashville R. R. Co., and sureties on the cost bond all the costs of this cause, for which let fi. fa. issue.

63 *Bill of Costs.*

State Tax,	$2.50
County Tax,	2.50
R. E. L. Proffitt, Clerk, filing papers, 75c, Doc. 30c, issuing 1 spa 10c, 2 Cont. 50c, Order amending warrant 25c, order withdrawing exceptions to dep. 25c, Judgment 75c, taxing cost 50c, Motion for new trial & Motion in arrest of judgment 50c, Appeal and orders 75c, Order allowing 30 days to file exceptions 25c, filing exceptions 25c, taking and filing bond 50c, order to send original exhibits 25c, filing Dep. 25c. Transcript 6900 words at 10c per 100, $6.90, Certificate 25c, Seal 50c, postage, 25c,	$14.05
J. H. Dowell, J. P. Warrant 25c, judgment 75c, Doc 15c, bond 50c, taxing cost 25c,	1.90
A. L. Weeks, Sheriff, Serving warrant,	.50
D. R. Myers, D. S. Executing 1 spa.	.25
J. G. McLean, N. P. Taking Deposition &c. $3.50, Express paid 60c.	4.10
	$25.80
Clerk Roach fees as taxed	40.75
State Tax Sup. Court	5.00
	71.55

64 STATE OF TENNESSEE:
Putnam County:

I, R. E. L. Proffitt, Clerk of the Circuit Court of said County, certify that the foregoing is a full, true and correct transcript of the record in the case of Louisville & Nashville Railroad Company against Garrett A. Maxwell, tried at the March Term, 1912 of the Circuit Court of said County, as the same appears of record in my office.

Given under my hand and seal of office, at office in Cookeville, Tennessee, this the 30th day of April 1912.

[SEAL.] R. E. L. PROFFITT, *Clerk.*

65 Office of Clerk of the Supreme Court for the Middle Division of the State of Tennessee.

I, Joe J. Roach, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Transcript,

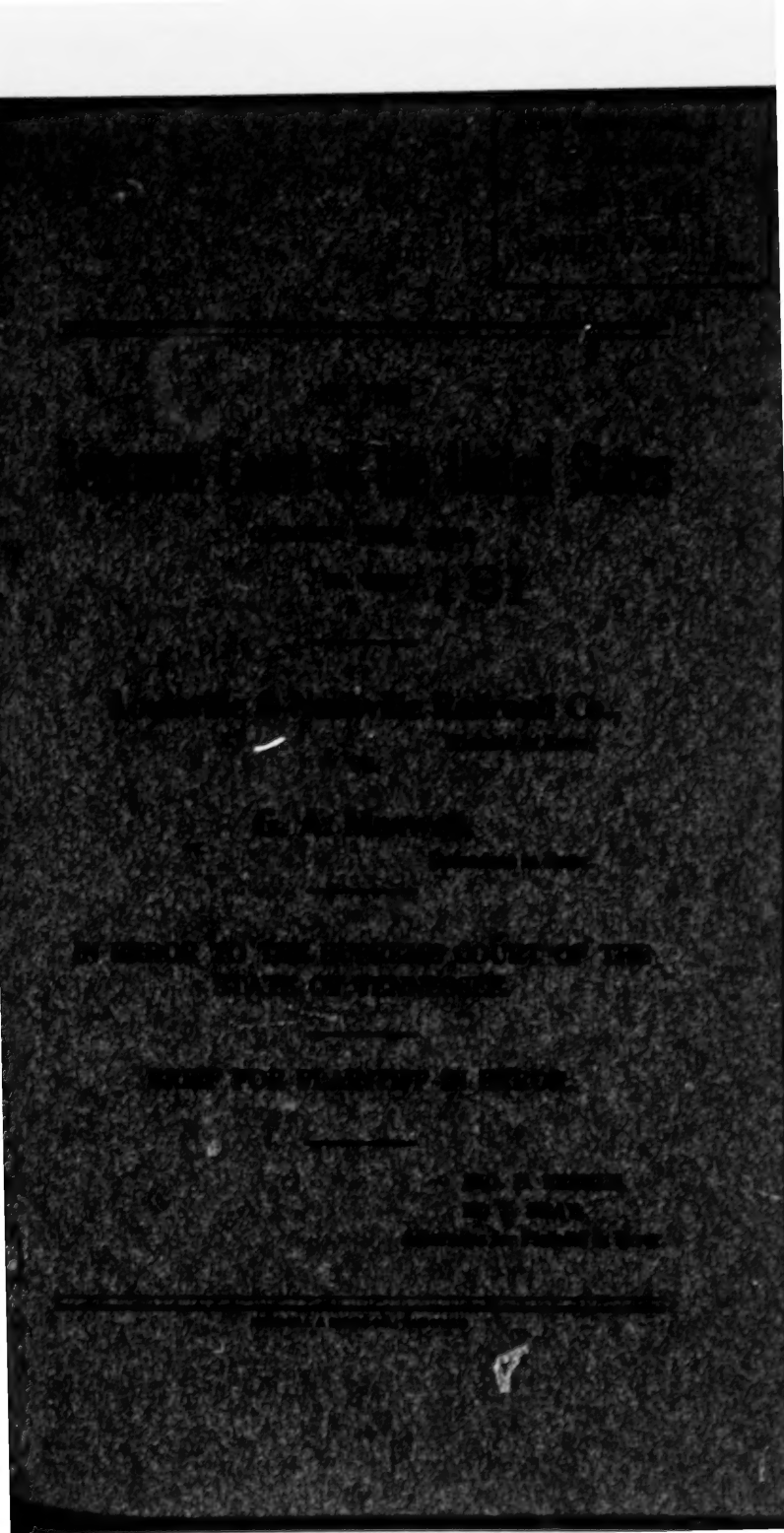
Opinions & Judgments of said Court, pronounced at its December term 1912, in case of Louisville & Nashville R. R. Co., against G. A. Maxwell as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court at office, in the Capitol at Nashville, on this the 21 day of May, 1913.

[Seal Supreme Court, Nashville.]

JOE J. ROACH, *Clerk*,
By —— ——, *D. C.*

Endorsed on cover: File No. 23,714. Tennessee Supreme Court. Term No. 569. Louisville & Nashville Railroad Company, plaintiff in error, vs. G. A. Maxwell. Filed May 23d, 1913. File No. 23,714.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 569.

LOUISVILLE & NASHVILLE RAILROAD CO.,
Plaintiff in Error,

VS.

G. A. MAXWELL,
Defendant in Error.

In Error to the Supreme Court of the State of Tennessee.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This suit originated before a Justice of the Peace in Tennessee. It was brought by the Louisville & Nashville Railroad Company, the Plaintiff in Error, against G. A. Maxwell, the Defendant in Error.

In this suit, the Railroad Company sought to recover of Maxwell what it claimed was an undercharge, arising out of a mistake made by its

agent at Nashville, Tennessee, in selling Maxwell two passenger tickets calling for transportation from Nashville, Tennessee, to Salt Lake City, Utah, and return. The amount involved was $58.30.

The Plaintiff in Error lost the suit before the Justice of the Peace, and prosecuted an appeal to the Circuit Court of Putnam County, when the judgment of the Justice of the Peace was affirmed and thence an appeal was prayed to the Court of Civil Appeals of Tennessee. That Court affirmed the judgment of the Circuit Court. Thereupon the Plaintiff in Error prosecuted a petition for Certiorari and Supersedeas to the Supreme Court of the State of Tennessee. The petition was granted, and the case heard in due course. Upon consideration, that Court, on the 29th day of March, 1913, affirmed the judgment of the Court of Civil Appeals, and dismissed the suit.

From that judgment of the Supreme Court of Tennessee, this Writ of Error was sued out and errors were assigned.

THE FACTS OF THE CASE.

The Plaintiff in Error, and connecting carriers, had properly filed with the Interstate Com-

merce Commission, and had published, according to law, tariffs, containing round trip rates, from Nashville, Tennessee, to Salt Lake City, Utah, and return. In these tariffs there was a rate for a round trip, routed on the going trip by way of Chicago, Ill., Denver, Colo., and routed on the return by way of Denver, Colo., Amarillo, and Fort Worth, Texas, and Memphis, Tennessee.

According to these tariffs, the fare prescribed for each ticket to this point, and return, as routed was $78.65.

(Tr., p. 16; testimony of R. D. Pusey.)

The agent of Plaintiff in Error, located at Nashville, sold Defendant in Error, Maxwell, two of these first described tickets, for $49.50 each, or, at $29.15 less than the tariff rates. That is to say, that in the two tickets there was an undercharge of $58.30, to recover which this suit was brought.

(Tr., p. 10.)

There is no dispute as to the facts, and these are fully set forth in the opinion of the Court of Civil Appeals, found at page 22 of the Transcript, and incorporated into the opinion of the Supreme Court as appears on page 30 of the Transcript.

The Defendant in Error sought to avoid the effect of these facts, by proof to the effect that there were other rates from Nashville to Salt Lake City and return, as hereinbefore described, which were the same as that he paid for these tickets; and that although he was at first told that the tickets he bought were sold at a higher rate than these, yet finally he was informed by the agent that he could make the trip according to the routes specified in the tickets at the same cost that he could purchase tickets by the other and cheaper routes, and that relying upon this representation, he bought the tickets and made the journey.

(Tr., pp.. 19, 20.)

Upon these facts, the Court of Civil Appeals took the following position, in affirming the judgment of the Circuit Court:

1. That Maxwell was in no fault.

2. That Maxwell made repeated inquiries, and only purchased the tickets in question after he had been assured by the agent that they were for sale at a price as low as the price charged for the routes, that, according to the published rates, was somewhat different and cheaper.

3. That the agent had fixed the route and named the price.

4. That the railroad could not invoke the aid of the Court to collect the difference between the price paid and the published tariffs, saying:

> "It results, that while we recognize as correct the construction placed on the Interstate Commerce Act by the Plaintiff in Error's counsel, and the obligation of Mr. Maxwell to pay the balance of $58.30, we hold that Plaintiff in Error is not in position to invoke the aid of the Court in enforcing that obligation, and for this reason, and this alone, the judgment of the lower Court is affirmed with costs."

The Supreme Court of Tennessee, by a divided Court, three to two, affirmed the Court of Civil Appeals, but based its action in affirming the judgment of said Court upon a wholly different ground to that upon which the Court of Civil Appeals affirmed the judgment of the Circuit Court of Putnam County and the Justice of the Peace, as will be seen hereinafter.

From the judgment of the Supreme Court of Tennessee a Writ of Error has been sued out, and errors assigned as follows:

ASSIGNMENTS OF ERROR.

I.

The Supreme Court of the State of Tennessee erred in holding that the Plaintiff, Louisville &

Nashville Railroad Company, was not entitled to recover against the Defendant, G. A. Maxwell, the sum of $58.30, the amount of an undercharge sued on in this cause, and in holding that under the Act of 1887, known as the "Interstate Commerce Commission Act," and amendments thereto, said Railroad Company was precluded from recovering in this cause; and in holding that the act of the Louisville & Nashville Railroad Company in selling said tickets at the price of $49.50 each, instead of $78.65 each, did not amount to a discrimination.

II.

The Supreme Court of the State of Tennessee erred in holding that the Plaintiff, Louisville & Nashville Railroad Company, was not entitled to recover the sum of $58.30 against the Defendant, G. A. Maxwell, the amount of undercharge on two tickets from Nashville, Tennessee, to Salt Lake City, and return, and in holding that it would be unfair and unjust to Defendant Maxwell to require him to pay the regul riff rate because of the error of the Railroad Company in routing, when he received no advantage therefrom, it appearing from the admitted facts in the case, and as found by the Court of Civil Appeals and the Supreme Court, that at the time Defendant Maxwell went to purchase the two tickets, he stated to the agent of the Railroad

Company that he wanted to go by Chicago and Denver, and return by Stanford, Texas; and that the rate charged Maxwell for said tickets was below the published tariff rates which the Railroad Company had filed with the Interstate Commerce Commission.

BRIEF.

There is no dispute about the propositions of fact in this record. It is admitted that the agent of the carrier sold the tickets in question at rates below the published tariffs.

The Court of Civil Appeals affirmed the judgment of the Circuit Court and the Justice of the Peace, upon the ground, as heretofore set forth, that the Railroad Company had been guilty of negligence in the sale of the tickets, and therefore the Court would leave the parties in the positions in which they had placed themselves.

This Court recognized as sound the insistence of the Railroad Company as to the obligation of the Defendant Maxwell to pay the undercharge. Nevertheless, it held, for the reasons above stated, that the Railroad Company was not in position to invoke the aid of the Courts in enforcing that obligation.

An examination of the memorandum opinion by the Supreme Court of Tennessee will show that while that Court affirmed the judgment of the Court of Civil Appeals, it did not do so upon the grounds stated in the opinion of the Court of Civil Appeals, the Supreme Court saying in its opinion as to this, at Transcript page 31:

> "While this principle of law is well sustained by authority, and is generally accepted, still, it has a well-known exception, to the effect that relief will generally be granted against contracts made in contravention of the policy of a public statute."

The Court then refers to the cases of *Railway* v. *Hefley,* 158 U. S., 98; *Texas, Pacific Railway Co.* v. *Mugg,* 202 U. S., 242; *Railway* v. *Cotton Oil Company,* 204 U. S., 437, and says:

> "The cases cited firmly establish the proposition, that it is beyond the power of the carrier to depart from its published rates in favor of any shipper, and the fact that the lower rate is erroneously quoted to the shipper by the agent of the Railroad Company does not relieve the shipper from liability to pay the higher published rate."

And, continuing, the Court says, at Transcript page 32:

> "While this is true, the majority of the Court are of opinion that the principle

stated does not control this case, for the reason that Maxwell could have gone to the point of destination, Salt Lake City, one route, and have returned another route, at the price actually paid for the tickets, and, therefore, the mere misrouting of the ticket by the Railroad Company is not a discrimination. In addition, it is unfair and unjust to Mr. Maxwell to require him to pay the larger rate because of the error of the Railroad Company in the routing when he received no advantage therefrom, and was misled into a course of action through the error of the Company, when he would have chosen one of the alternative routes at the price paid.

"The facts shown by the Court of Civil Appeals show that he could have gone to Salt Lake City at the price paid, over other routes, going and returning through Chicago and Denver, or going through St. Louis and Denver, and returning through Denver, Amarillo and Memphis, either one of which would have met his requirements.

"Chief Justice Neil and Mr. Justice Green are of the opinion that this case cannot be distinguished from *Railroad Co.* v. *Hefley, supra, T. & P. Ry. Co.* v. *Mugg, supra,* and upon that ground they dissent."

With reference to the statement above quoted, that it would be unfair and unjust to Mr. Maxwell to require him to pay the larger rate because

of the error of the Railroad Company in the routing, when he received no advantage therefrom, and was misled into a course of action because of the error of the Railroad Company in the routing, when he would have chosen one of the alternative routes at the price paid, the facts show that the Court was in error. What the Court of Appeals said was this, as found in its opinion, at Transcript pages 22 and 23.

> "At the time, he in fact could have gone to Salt Lake City at the rate which he paid, but over other routes, going and returning through Chicago and Denver, or through St. Louis and Denver, or going through St. Louis and Denver and returning through Denver, Amarillo and Memphis."

The Court will see that the rate quoted applied to the route going through St. Louis and Denver, and returning through Denver, Amarillo and Memphis. Mr. Maxwell wanted a ticket going through Chicago and Denver, and returning through Denver, Amarillo and Memphis in order to enable him to stop over at Stanford, Texas, where it is shown (as set forth in the testimony at page 19 of the Transcript) his wife had a brother, whom she had not seen for several years, and it is manifest that it was the purpose of Mr. Maxwell and his wife to make a visit to this brother.

It is nowhere shown in the record that Maxwell could have gone through Chicago and Denver and return through Denver, Amarillo and Memphis at the rate at which the tickets were sold, the undisputed evidence being that in order to make the trip which he desired, the published tariff rates required a charge of $78.65.

It is our insistence that the *Hefley* and the *Mugg cases,* and the *Cotton Oil Case,* heretofore referred to, are controlling of the case at bar. This was the view of two members of the Supreme Court of Tennessee, Chief Justice Neil and Mr. Justice Green:

AUTHORITIES.

In the case of

PENNSYLVANIA RAILROAD CO. *v.* INTERNATIONAL COAL COMPANY,

230 U. S., at page 197,

it is said:

> "The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much, and then make a corresponding rebate; nor could it claim that it had charged too little, and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, sec. 2; March 2, 1899, 25

Stat. 855, c. 382, sec. 6. *Armour Co.* v. *U. S.*, 56, 83.) The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon the railroad and shipper alike. If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

In the case of

ARMOUR PACKING CO. *v.* UNITED STATES,

209 U. S., 56, at pages 80 and 81, it is said:

"In the Elkins Act, Congress has made it a penal offense to give or receive transportation at less than the published rate. This rate can only be raised by ten days', or lowered by three days' notice. Sec. 6, 25 Stat., 855. There is no provision excepting special contracts from the operation of the law. One rate is to be charged, and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute."

It must be conceded that the effect of the holding of the Supreme Court of Tennessee, was to give to the Defendant, Maxwell, a lower rate than other passengers would have had to pay for their transportation according to the published rate.

The fact that the Defendant, Maxwell, acted in good faith, or did not know what the published rate was, cannot alter the constitution or change the result in this case. As said by this Court, in the case of

CHICAGO & ALTON R. R. CO. *v.* KIRBY,

225 U. S., 155, at page 166:

> "That the Defendant in Error did not see and did not know that the published rates and schedules made no provision for the service he contracted for, is no defense. For the purpose of the present question, he is presumed to have known. The rates were published and were accessible, and, however difficult to understand, he must be taken to have contracted for an advantage not open to others. *Texas & P. Ry. Co.* v. *Mugg,* 202 U. S., 242."

In the case of

KANSAS SOUTHERN RY. V. CARL,

227 U. S., 653, it is said:

> "Neither an unintentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact, and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed."

See also:

ADAMS EXPRESS CO. *v.* CRONINGER, 226 U. S., 491.

In the case of

LOUISVILLE & NASHVILLE RAILROAD CO. v. ALLEN,

decided by the Court of Civil Appeal of Kentucky, February 11, 1913, reported in 153 S. W., page 198, it was held that a shipper's contract with a railroad company for the transportation of an interstate shipment at a rate less than that established by a schedule filed pursuant to Interstate Commerce Act (Act of February 4, 1887, c. 104, 24 Stat., 380, U. C. Comp. St., 1901, p. 3156), Section 6 was void, although the shipper did not know he was receiving a preferential rate; and hence did not estop the Railroad Company from recovering the freight due on account of the undercharge.

In this case, it appeared that the Louisville & Nashville Railroad Company filed a suit in the Allen Circuit Court, against J. W. Allen, in which it sought to recover of him, $732, alleged to be due on account of undercharges made by it in the shipment of freight over its lines between Wildwood, Petroleum and Adolphus, in Kentucky, and other points along its line in the State of Tennessee and Scottsville, Ky.

The Defendant answered, denying that he was indebted to the Company in any sum whatever; pleaded that prior to the date of the shipments, upon which it was alleged there was an undercharge, the Company had posted in its depots along its line, a schedule of tariff rates; and that the shipments were made by him in accordance with the provisions of this tariff schedule—that is, at the rate therein specified; that now, to permit the Company to charge him a rate in excess of that agreed upon, would cause him to suffer great loss; that if there was an undercharge, which he denied, the Plaintiff knew all along that this undercharge was made, and suffered and permitted it to continue; and that it should not be heard to complain, or enable to recover it back at his expense.

The affirmative matter of the answer was traversed in the reply. Proof was taken, the case submitted, and the Chancellor, upon consideration, held that the Railroad Company was not entitled to the relief sought, and dismissed the petition.

The Railroad Company appealed. The action of the Chancellor was reversed, and the Railroad Company held to be entitled to recover the undercharge.

The duty of collecting an undercharge is not only imposed upon the carrier by the Interstate Commerce Act; but by the express ruling of the Interstate Commerce Commission, No. 187, it is provided:

> "The Commission adheres to its previous ruling that the carriers must exhaust their legal remedies to collect undercharges."
>
> *Grain Co.* v. *Railway Co.*, 12 I. C. C. Reports, 418.

The Supreme Court of Alabama, in the case of

SOUTHERN RAILWAY *v.* HARRISON,

24 Sou., 552, lays down the following as the law:

> "The clear effect of the decision (*Railroad Company* v. *Hefley*, 158 U. S., 98) hereinabove referred to, was to declare that one who has obtained from a common carrier a rate specified in the bill of lading, less than the published rate filed with, and approved by, the Interstate Commerce Commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any other sum less than the schedule charges —in other words, that whatever may be the rate agreed upon, the carrier's lien on the

goods is, by force of the Act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods only by the payment, or tender of the payment for such amount. Such is now the Supreme law, and by it, this and the Courts of other States are bound, and for this reason our ruling in the *Dismukes case* can no longer be followed."

Conclusion.

Under the cases cited in the Brief, this Court has decided every principle that is involved in this litigation. In addtion to that, it has applied the principle to concrete cases.

It has sustained the general proposition, that when a rate is once established by filing tariffs with the Interstate Commerce Commission, it is the only lawful rate. This is illustrated in the case of *Railway* v. *Hefley,* 158 U. S., 98.

It has decided that a shipper cannot maintain an action for damages against the carrier, upon the basis that it had made a contract at a less rate than the published tariff, because such a contract was void as in violation of the law, as illustrated by the case of *Texas & Pacific Railway Company* v. *Mugg,* 202 U. S., 242.

It has held that the person dealing with the carrier, and making such an unlawful contract, is presumed conclusively to know of the published tariffs, and that he acts in violation of the law, as held in the case of *Kansas Southern Ry.* v. *Carl,* 227 U. S., 653.

It has held that a person dealing with the Railroad, and violating this rule, however unintentionally, is guilty of an offense against the statute as well as the Railroad, as illustrated in the case of *Armour Packing Co.* v. *United States,* 209 U. S., 56.

It has held every concrete proposition in this case to be the law, except the proposition that the Railroad Company may, notwithstanding the illegality of its contract, recover from the passenger or shipper, the undercharge. And this proposition is sustained by the case of *Louisville & Nashville Railroad Co.* v. *Allen,* 153 S. W., 198, heretofore cited.

To hold otherwise, would be in a great measure to violate the law, insofar as the shippers and passengers are concerned. It would open an easy way for rebates in petty, small matters. This is true because it would be practically impossible to convict before a jury, the average citizen, by reason of the fact that he had accepted the benefit

of a contract of this kind, when he was innocent of any intentional wrong-doing.

It would relegate the remedy of the government, in the enforcement of the law in this regard, to criminal proceedings entirely, wherever the law had miscarried by reason of an undercharge.

There can be no real reason why the Railroad Company should not be permitted to prosecute this action, if it should be permitted to defend an action for damages for a breach of such contract; or if it were permitted, before delivery, to collect a greater amount than it had stipulated for in the bill of lading.

Insofar as the proposition announced by the Supreme Court of Tennessee, to the effect that the passenger had been misled, is concerned, that argument would apply equally in a case where a person had been misled in regard to freight charges, and had made his contract in reference to freight charges; and yet the Courts have invariably repelled him when he sought to replevy his goods without payment of the tariff charges, when demanded.

Insofar as the position of the Supreme Court of Tennessee, based upon the finding of the Court of Civil Appeals, that it was inequitable to per-

mit a recovery where Maxwell was innocent of any wrong-doing, is concerned, we have to say, in reply, that the law presumes that Maxwell was guilty of wrong-doing. If the law presumes that he knew what the published rates were, the law presumes that he knew that the agent was wrong when he quoted him the rate, and that the agent was violating the law when he did so.

If this be a correct interpretation, then, although as a matter of fact, Maxwell may have been guilty of no wrong-doing, he was, as a matter of law, guilty of wrong-doing. If a man may be subjected to criminal procedure by reason of this legal presumption, certainly he should be subjected to a civil procedure.

For these reasons, and in view of the authorities heretofore cited, we respectfully insist that the case should be reversed and remanded for further proceedings.

Respectfully submitted,

JNO. B. KEEBLE,
ED T. SEAY,
Attorneys for Plaintiff in Error.

SUBJECT INDEX.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 569.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

Plaintiff in Error,

VS.

G. A. MAXWELL,

Defendant in Error.

In Error to the Supreme Court of the State of Tennessee.

Brief for Defendant in Error.

STATEMENT OF THE CASE

This suit was originally brought before a Justice of the Peace in Tennessee by the Louisville & Nashville Railroad Company, the plaintiff in error, against G. A. Maxwell, the defendant in error, to recover an alleged undercharge of

$58.30 on two round-trip railroad tickets from Nashville, Tennessee, to Salt Lake City, Utah, and return.

The Justice of the Peace denied recovery and the railroad company appealed the case to the Circuit Court of Putnam County, Tennessee, where the judgment of the Justice of the Peace was affirmed (Tr., p. 13); from this judgment the railroad company perfected an appeal to the Court of Civil Appeals of Tennessee, which Court affirmed the judgment of the Circuit Court below (Tr., p. 21); and thereupon, at the instance of said railroad, the Supreme Court of Tennessee, the Court of last resort of said State, having granted a petition for *certiorari* to the Court of Civil Appeals, heard the case and affirmed the judgment of the Court of Civil Appeals dismissing the railroad's suit to collect the alleged undercharge (Tr., pp. 29-33).

To review this judgment of the Supreme Court of Tennessee, the writ of error in this case was sued out, and the railroad company has assigned errors in this Court.

THE ASSIGNMENTS OF ERROR.

In this Court the plaintiff in error assigns two errors against the opinion and holding of the Supreme Court of the State of Tennessee:

(1) It is insisted that the Supreme Court of Tennessee erred in holding that the railroad was not entitled to recover against defendant G. A Maxwell the sum of $58.30, the amount of the alleged undercharge, and in holding that the act of the railroad in selling the two railroad tickets in question, at the price of $49.50, instead of $78.65 each, did not amount to a discrimination.

(2) It is insisted that the Supreme Court of Tennessee erred in holding that the railroad was not entitled to recover the sum of $58.30, the amount of the alleged undercharge against the defendant G. A. Maxwell, upon the ground that it would be unfair and unjust to require him to pay the regular tariff rate because of the error of the railroad in misrouting the defendant Maxwell and wife, who used the tickets in question, when Maxwell received no advantage from said misrouting.

REPLY BRIEF AND ARGUMENT.

It will not be necessary to notice the two assignments of error under separate heads. The answer we make to both assignments is the same. Our insistence is that the Supreme Court of Tennessee was correct in holding that the railroad was not entitled to recover the amount of this alleged undercharge, because the price of $49.50, which Maxwell paid for each of the two round-trip tickets from Nashville, Tennessee, to Salt Lake City, Utah, and return, was not an undercharge, but the fare prescribed for such a round-trip journey by the tariffs of the railroad lawfully on file with the Interstate Commerce Commission; and the fact that the railroad misrouted Maxwell and wife, and sent them over a route on this round-trip journey which was of no advantage to them, and which they did not care to travel, cannot enable the railroad to recover the alleged undercharge of $58.30 on these two tickets, merely because the two fares for the round trip over the erroneous route happened to exceed by this amount the regular tariff fare of $49.50 each, to which the misrouted passengers were entitled.

THE FACTS OF THE CASE.

The Court of Civil Appeals of Tennessee found the controlling facts of the case to be few and undisputed, and the finding of facts of said Court was adopted as a finding of facts by the Supreme Court of Tennessee.

With reference to the facts, the Court of Civil Appeals of Tennessee found the following:

> "The essential and controlling facts are few and undisputed. They are these: Defendant in error, G. A. Maxwell, after repeatedly seeing and talking with the agents or representatives of the Louisville & Nashville Railroad Company at Nashville, Tennessee, in regard to rates on round-trip tickets to Salt Lake City, Utah, and return, and after receiving a letter from the railroad company in regard thereto and answering that letter, all of which matters occurred between January, 1910, and June of that year, on or about the first of the last named month, purchased two passenger tickets from Nashville, Tennessee, to Salt Lake City, by the way of Chicago, Illinois, Denver, Colorado, and routed to return by Denver, Colorado, Amarillo and Fort Worth, Texas, and Memphis, Tennessee, and paid for each ticket the sum of $49.50.
>
> "There were at that time published rates

under the provisions of the Interstate Commerce Act by which fares over the route actually traveled, going and coming, aggregated $78.65 each, or $29.15 each more than was charged and collected therefor, making a difference of $58.30 between the amount paid by Mr. Maxwell for the tickets in question and the amount that should have been charged and collected. Mr. Maxwell was informed when he first made inquiry about the tickets in January that there were no special rate tickets at that time, but likely would be by May or June 1st. He then, and on several occasions thereafter, made known his desire to go to Salt Lake City by one route and return by another, and was told that he could not be furnished reduced rates except by going and coming over the same route, but after repeated inquiries and the correspondence referred to he was informed that he could make the trip on reduced rates one way and return another; and when he went finally to purchase the two tickets, he stated to the agent that he wanted to go by way of Chicago and Denver and return by the way of Stamford, Texas, and was given the tickets routed as hereinabove noted, at the rates mentioned.

"At that time he in fact could have gone to Salt Lake City at the rate which he paid, but over other routes, going and returning through Chicago and Denver, or through St. Louis and Denver, or through Memphis

and Denver, or going through St. Louis and Denver and returning through Denver, Amarillo and Memphis.

"Mr. Maxwell was in no way at fault in the matter. He did no more than tell the agent the points to which he wished to go and made it known that he did not wish to go and return by the same route. The agent fixed the routing and named the fare, and Maxwell paid without further question." (Tr., pp. 22, 23.)

The Supreme Court of Tennessee adopted as accurate the above finding of facts by the said Court of Civil Appeals (Tr., pp. 30, 31); and found in addition that Maxwell received no advantage from the misrouting by the railroad, and was misled into a course of action through the error of the railroad; and that had he not been so misled and misrouted, Maxwell would have chosen an alternative route over which the regular tariff fare was the price he actually paid, which alternative route would have met all his requirements. In this connection the Supreme Court of Tennessee, conceding, of course, the firmly established proposition that it is beyond the power of a carrier to depart from its published rates in favor of any shipper or passenger, and that the fact that the lower rate is erroneously quoted by the agent of the railroad company does not relieve the shipper or passen-

ger from liability to pay the higher published rate, said:

> "While this is true, the majority of the Court are of opinion that the principle stated does not control this case, for the reason that Maxwell could have gone to the point of destination, Salt Lake City, one route and have returned another route at the price actually paid for the tickets, and, therefore, the mere misrouting of the ticket by the railroad company is not a discrimination. In addition, it is unfair and unjust to Mr. Maxwell to require him to pay the larger rate because of the error of the railroad company in the routing when he received no advantage therefrom, and was misled into a course of action through the error of the company when he would have chosen one of the alternative routes at the price paid.
>
> "The facts shown" (found) "by the Court of Civil Appeals show that he could have gone to Salt Lake City at the price paid over other routes going and returning through Chicago and Denver or going through St. Louis and Denver and returning through Denver, Amarillo and Memphis, either one of which would have met his requirements." (Tr., p. 32.)

The undisputed facts revealed by the record show that Maxwell, after several inquiries of the

railroad's agent at Nashville, was notified on May 1, 1910, that the round-trip fare of $49.50 from Nashville to Salt Lake City and return would go into effect June 1st of that year; and that the railroad's agent then told Maxwell that to go from Nashville to Salt Lake City and return on the route to which this fare of $49.50 was applicable, he would have to go and come the same route; and that inasmuch as Maxwell desired to visit Stamford, Texas, on the trip, the best route for him to take, to which the $49.50 fare was applicable, would be to go through St. Louis; and Maxwell had concluded to go via this route (Tr., pp. 18, 19).

Thereafter, Maxwell happened to meet, on a train between Cookeville and Monterey, Tennessee, a friend, Mr. W. V. Davidson, who was going with his wife from Nashville, through Chicago, to Denver on June 1, 1910; and this friend asked Maxwell why, in making his trip to Salt Lake City, he would not go with them via Chicago, and thence on to Salt Lake City, and return via Stamford, Texas, and St. Louis to Nashville; and when Maxwell told Mr. Davidson that the railroad's agent had said he would have to go and come through St. Louis to get the benefit of the $49.50 rate, Davidson said he did not understand this, and that when he returned to Nashville he was going to see the railroad's agent

about it. In a few days thereafter, Maxwell received a letter from Mr. Wallis, the railroad's agent, stating that he could make the trip at the $49.50 rate, going one way and returning the other, if he so desired; and immediately Maxwell wrote the railroad's agent that he preferred going through Chicago, but did not state to him what route he preferred to return over, as it was immaterial to him what way he was routed back (Tr., pp. 18, 19).

When the tickets were purchased, Mr. Davidson met Maxwell and wife in the railroad's ticket office in Nashville, and stated that he had made the Pullman reservation, and then Maxwell purchased the railroad tickets from the agent, stating to him that he wanted to go via Chicago, through Denver, to Salt Lake City, and from Salt Lake City to Stamford, Texas. These were all the points that Maxwell asked to go to. It was so immaterial to Maxwell how he was routed back from Stamford, Texas, that it was not until he arrived at Chicago that he happened to notice that he had been routed back through Memphis, Tennessee (Tr., p. 19). It is undisputed the fare of $49.50 was the regular tariff fare over several round-trip routes from Nashville to Salt Lake City and return, provided the passenger went from Nashville to Salt Lake City and

returned through the same gateway—as, for instance, going and returning through the Chicago gateway, the St. Louis gateway, or the Memphis gateway. In this connection, Mr. Maxwell said:

> "The amount of money I paid, $49.50 for each ticket, was their published rate through and returning by the same gateway." (Tr., p. 20.)

It should be constantly remembered that it was immaterial to Maxwell whether he went and returned through the same gateway to the West or not, so long as he was enabled to return from Salt Lake City via Amarillo and Fort Worth, so that he could stop off at Stamford, Texas; and as we have seen, before he was misled by the railroad's agent, he had intended going and coming through the St. Louis gateway; and, after being informed by the railroad's agent that he could have the benefit of the $49.50 rate and still be able to travel with his friends as far as Denver, in going to Salt Lake City via Chicago, it was not until the latter place was reached that Maxwell even noticed that he had been routed back, not through the same gateway, Chicago, but through the different gateway, Memphis (Tr., p. 19).

The tariffs of the railroad company seemed very misleading, even to Mr. R. D. Pusey, the

Assistant General Passenger Agent of the railroad, who was the only witness examined by the railroad in the case; and the testimony of this witness with reference to these tariffs, and the rate of $49.50 for the round trip from Nashville to Salt Lake City and return, is inherently inconsistent and contradictory. In speaking of one tariff, I. C. C. No. F-1299, on file with the Commission, this witness testified that the rate of $49.50 was applicable going and returning via the same route; and with reference to this tariff which the witness filed as his Exhibit No. 1, he was asked and answered:

> "Q. That tariff, as I understand, provides for a rate of $49.50 from Nashville to Salt Lake and return, going and returning by the same route?
> A. Yes, sir." (Tr., p. 16.)

The same witness, however, testified that there was a round-trip route from Nashville to Salt Lake City by which the $49.50 rate was applied, which route was not going and returning through the same gateway. In this connection the witness was asked and answered:

> "Q. If there was in effect a round-trip rate of $49.50 from Nashville to Salt Lake and return to Nashville, please state the route by which that rate applied, and by

which a passenger on a ticket at that rate could have traveled?

A. A passenger could have traveled at the rate of $49.50 from Nashville to Salt Lake and return, going and returning through Chicago and Denver, going and returning through St. Louis and Denver, going and returning through Memphis and Denver; or, he could have traveled *at that rate* going through St. Louis and Denver, and *returning through Denver, Amarillo, Texas, and Memphis,* or the reverse of that route." (Tr., p. 15.)

And again, this witness testified that by tariff I. C. C. No. F-1297, on file with the Commission, there were "diverse or variable routes" from Nashville to Salt Lake City and return, on some of which the rate of $49.50 applied, while on others a round-trip rate of $53.60 applied, according to the route used; in this connection the witness reveals that there were fourteen of such variable routes, numbered from 1 to 14, on page 72 of said tariff (Tr., p. 16); and an examination of page 72 of said tariff (if the Court permits this tariff to be filed in view of the state of the record to be hereinafter noted), will reveal that upon nine of these fourteen variable routes for round trips from Nashville to Salt Lake City and return the $49.50 rate paid by Maxwell was the actual tariff rate.

So we say there is abundant evidence to sustain the finding of the Supreme Court of Tennessee to the effect that Maxwell could have gone from Nashville to Salt Lake City and return at the price paid over other routes "going and returning through Chicago and Denver, or going through St. Louis and Denver and returning through Denver, Amarillo and Memphis, either one of which would have met his requirements." (Tr., p. 32.)

The truth is that this railroad seemed to be unable to understand its own tariffs, for the undisputed testimony reveals that while the railroad is now claiming an undercharge of $59.30 on the two round-trip tickets in question, when the company was writing to Mr. Maxwell after he completed his journey, it stated and claimed a total undercharge of only $24.30 (Tr., p. 20).

We submit that the record in this case presents no showing that will warrant this Court in differing with the Supreme Court of Tennessee upon the finding of fact to the effect that there were round-trip routes from Nashville to Salt Lake City and return available to Maxwell, and which met all his requirements, for which the regular fare fixed by tariffs on file with the Interstate Commerce Commission was only $49.50, the amount actually paid by Maxwell, and this

being so, we submit that there is no provision of the Act to Regulate Commerce, and no public policy deducible from any decision of this Court or the Interstate Commerce Commission, which calls for any holding that in such a case the railroad acquires a right to collect an undercharge, merely because it misrouted a passenger over a route for which it insists it is able to conjure out of its tariffs a higher rate than the one demanded of and paid by the passenger, who received no additional benefit or thing of value by reason of the misrouting.

CONDITION OF THE RECORD AS TO THE TARIFFS.

We submit that the condition of the record in this case with reference to the four voluminous tariffs exhibited by the railroad's only witness, R. A. Pusey (Tr., pp. 16, 17), is such that it is impossible for this Court to be able to review and reverse the holding of the Supreme Court of Tennessee.

These four tariffs, which are alleged by the plaintiff in error to furnish, and which of necessity must furnish, the foundation of the claim of an undercharge, were exhibited by the railroad's only witness, Pusey, and marked, respectively,

Exhibits Nos. 1, 2, 3 and 4 to his testimony in the State Court (Tr., pp. 16, 17); and these voluminous tariffs, which the context of the witness Pusey's testimony shows consisted of hundreds of pages of printed matter, and upon which this witness undertook to ground his entire testimony, and upon the contents of which the claim of an undercharge absolutely depends, were not copied into the record in this case, and are not before this Court.

These voluminous tariffs are not "Exhibits of Material" within the meaning of Rule 33, page 36, of the printed Rules of this Court, as the Rules were promulgated December 22, 1911; and it was the duty of the plaintiff in error under Rule 10, pages 16 to 19 of said Rules, to have these tariffs, which constitute the only foundation for the claim of an undercharge, printed in the record before this Court, before it can be able to establish affirmatively in this Court the alleged errors upon which it asks a reversal of the holding of the Court of last resort of Tennessee.

By Rule 14, pages 20 to 21 of the said Rules of this Court, the time for *certiorari* for diminution of the record has long since expired; and so, under the Rules of this Court it is now impossible, we submit, for the plaintiff in error to get before this Court these voluminous tariffs, the

provisions of which, of necessity, constitute the best and really the only evidence of the alleged undercharge to collect which plaintiff in error is asking this Court to reverse the holding of the Supreme Court of Tennessee.

We understand it to be the elementary rule and practice that the plaintiff in error must bring to this Court a record of all the material facts which were before the Supreme Court of Tennessee, and particularly a record containing the pivotal facts which are absolutely controlling upon the question of the undercharge—that is, the tariffs themselves, which, under the Act to Regulate Commerce, fix and measure the applicable rate. Every presumption here is in favor of the holding of the Supreme Court of Tennessee; and we submit that with the tariffs, which must fix and determine the applicable rate, not before this Court, nothing logically remains to be done but for this Court to affirm the action of the Supreme Court of Tennessee, for the reason that the record filed by the plaintiff in error does not affirmatively show and contain the tariffs which are themselves conclusive, the one way or the other, upon the question of the alleged undercharge.

The plaintiff in error regarded the presence of the original tariffs exhibited to Pusey's testi-

mony of so much importance in the Appellate Court of Tennessee, that on motion of the railroad in the Circuit Court of Putnam County it was specially ordered that these original exhibits to Pusey's testimony on file in the case should be sent up by the clerk instead of sending up copies of said exhibits (Tr., p. 13); but the record reveals that when the attorney for the railroad, pursuant to paragraphs 1 and 2 of Rule 8 of the Rules of this Court, gave a written direction to the Clerk of the Supreme Court of Tennessee indicating what portions of the record were to be incorporated into the transcript of the record to be sent to this Court, there was no indication or specification that these four tariffs exhibited by the witness Pusey should be incorporated into the record or transmitted to this Court at all (Tr., p. 9). So we submit that *certiorari* for diminution of the record, even if an application therefor had been made within the time specified by Rule 14, could not operate to reach and bring before this Court these tariffs not specified to be included within this record.

With the record in this condition, we submit that without more, the judgment of the Supreme Court of Tennessee must be affirmed, because the tariffs themselves, which must be relied upon to establish the alleged undercharge, are not before this Court, and under the Rules of this Court cannot be brought before the Court.

NO UNDERCHAGE — DEFENDANT IN ERROR PAID THE LAWFUL TARIFF RATE.

We were not attorneys in this case in any of its trials before the State Courts; and it is our purpose to submit this case upon brief, without oral argument.

Covering the contingency that the Court might permit the plaintiff in error, over our objection, to file and refer to these four tariffs omitted from the printed record, and desiring to be able to see what these tariffs actually revealed, for the purpose of discussing their contents in this brief, if the same should become material, we applied to the attorneys for the plaintiff in error, and the latter procured the four tariffs constituting the original exhibits to the witness Pusey's testimony, from the archives of the Supreme Court of Tennessee, and furnished them to us, and we have examined them.

We now submit that if the Court permits these tariffs to be filed and used as a part of the record in this case, an examination of the tariff I. C. C. No. F-1299, marked "Exhibit Pusey, No. 1" will reveal that the rate of $49.50 actually paid by Maxwell was not an undercharge at all, but was the correct tariff rate for the very route over

which Maxwell traveled upon the journey in question, in going from Nashville to Salt Lake City and return.

From the tabulation of rates on pages 169 and 170 of this tariff (Joint Tariff No. 3—In effect June 1, 1910, to September 30, 1910), it appears that the round trip tariff rate from Nashville, Tennessee, to *Ogden, Utah,* via the gateways of St. Louis or Memphis or Chicago or Shreveport, is $49.50, the amount actually paid by Maxwell. On page 41 of the same tariff, under the head of "† Utah," appears the direction that in figuring routes and rates to *Salt Lake City* the *same routes* and *rates* are to be used as are published in this tariff to *Ogden, Utah.*

We next call attention to page 50 of this same tariff, upon which there appear seventeen rules, numbered from 1 to 17, inclusive.

Rule No. 1, under the heading of "† Routes," declares—

> "1. The fares herein published apply for tickets going and returning via the same route only, except as otherwise specifically provided herein."

Rule No. 17, on the same page, under the head of "† Variable routes to Colorado, Idaho, Montana, Oregon *and Utah,*" declares—

"17. Tickets may be sold to Colorado, Idaho, Montana, Oregon and *Utah destinations* published in this tariff, routed west of Memphis, Tenn.; west of St. Louis, Mo., or west of Chicago, Ill., in *one* direction via *any one* of the routes, and in the *opposite* direction via *any other* of the routes authorized beyond the gateways named applicable from selling stations."

Now, the railroad's only witness, Pusey, to cross-examine whom no one was present for defendant in error, calls attention to pages 169 and 170 of the above quoted tariff, I. C. C. No. F-1299, but wholly fails to notice or make any remark or observation about the above quoted rules from page 50 of the same tariff, which manifestly are the rules by which all of the subsequent rate tabulations in said tariff are to be read and construed.

And we say it is perfectly clear that by Rule 17, page 50, of the above quoted tariff, which is an express exception to Rule 1 on the same page of the tariff, Maxwell, upon this round trip ticket sold to Salt Lake City, a Utah destination, routed through Chicago and west of Chicago in going to Salt Lake City, could be routed on the journey back home in the opposite direction, via Chicago, via Memphis, via Shreveport, or via St. Louis, for the round trip fare of $49.50,

as fixed by pages 169 and 170, in connection with page 41 of the same tariff.

We submit that Section 6 of the Act to Regulate Commerce, containing the provision:

> "Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property . . . than the rates, fares and charges which are specified in the tariffs filed and in effect at the time"—

was not violated by selling the two round-trip tickets in question to Maxwell for $49.50 each; and that in the light of the tariff rates and provisions above referred to, no undercharge thereby resulted; for the reason that the correct and lawful tariff rate for the particular round-trip route over which Maxwell actually journeyed from Nashville to Salt Lake City and return was actually paid by him.

Upon this ground, and independently of the grounds stated by the Supreme Court of Tennessee for its opinion and holding in this case, we submit that the judgment of the Supreme Court of Tennessee should be affirmed, because the round-trip rate of $49.50 paid by Maxwell for each of the two tickets in question was the lawful tariff rate and not an undercharge at all.

It is plain to us that the railroad's only witness, Pusey, and the State Courts of Tennessee, overlooked the applicable general rules on page 50 of this voluminous tariff I. C. C. No. F-1299, from which general rules it results that the railroad's agent originally selling Maxwell the two round-trip tickets in question routed through the gateway of Chicago in going to Salt Lake City, and through the different gateway of Memphis in returning to Nashville, for $49.50 each, did not to any degree violate the tariff or sell the tickets at less than the lawfully published and filed tariff rate.

At the bottom of page 50 of said tariff I. C. C. No. F-1299 there appears the following:

> "NOTE—East or south of Memphis, Tenn., St. Louis, Mo., or Chicago, Ill., tickets must read going and returning via the same route."

This note is not to any extent inconsistent with our construction of Rule 17 on this same page of the tariff. It is plain to us that all this note means is that in journeying from points east or south of Memphis, to Memphis and return, this journey, or this part of a longer journey routed going and returning via Memphis, must be made going and coming over the same route

between Memphis and any point south or east thereof; and so with reference to St. Louis; and so with reference to Chicago. This note is not at all inconsistent with the plain language of Rule 17 on the same page of the tariff, by which tickets might be sold to Colorado, Idaho, Montana, Oregon *and Utah* destinations routed west of Memphis, Tenn., west of St. Louis, Mo., or west of Chicago, Ill., in one direction, via any one of the routes, and in the opposite direction via any other of the routes authorized beyond the gateways named applicable from selling stations.

Under this rule 17, in connection with the routes and rates indicated on pages 169, 170 and 41 of the same tariff, it is plain to us that in going from Nashville to Salt Lake City, the passenger could be routed via the gateway of Chicago, and in returning could be routed back to Nashville via either the St. Louis, Memphis, or Shreveport gateway.

When tariff I. C. C. No. F-1297, Exhibit No. 2 to Pusey's testimony, is examined in connection with this witness' testimony (Tr., p. 16), it is very hard to reconcile the one with the other. As we read this last mentioned tariff, it is not inconsistent with tariff I. C. C. No. F-1299, which is Exhibit 1 to Pusey's testimony; but if

these tariffs are construed by the Court to be to any degree conflicting, we submit that Maxwell cannot be thereby prejudiced; and we further submit that tariff I. C. C. No. F-1299 will be controlling, because it was the *later* tariff, effective June 1, 1910, while the tariff I. C. C. No. F-1297 was effective May 28, 1910.

All our observations about tariffs, and the position we take to the effect that by the tariff I. C. C. No. F-1299 the rate of $49.50 paid by Maxwell for each of the two tickets in question was not an undercharge, but the lawfully published tariff rate, and that this fact was overlooked by the railroad's witness, Pusey, and by the State Courts of Tennessee—are upon the assumption that the Court may rule that these tariffs can now be gotten before the Court in some way as a part of the record in this case; though we submit that these tariffs are not properly before the Court, and under the rules cannot now be gotten before the Court as a part of the record in this case; and if this is so, we submit that the judgment of the Supreme Court of Tennessee should be affirmed because the plaintiff in error has failed to bring to this Court as a part of the record the tariffs themselves, which absolutely determine, the one way or the other, the question of the alleged undercharge.

AUTHORITIES CITED BY PLAINTIFF IN ERROR.

Plaintiff in error cites and relies upon the following cases: *Railway* v. *Hefley,* 158 U. S., 98; *Texas & Pacific Ry. Co.* v. *Mugg,* 202 U. S., 242; *Railway* v. *Cotton Oil Co.,* 204 U. S., 437; *Armour Packing Co.* v. *United States,* 209 U. S., 56; *Chicago & Alton R. R. Co.* v. *Kirby,* 225 U. S., 155; *Kansas City Southern R.* v. *Carl,* 227 U. S., 653, and *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S., 197.

There can be no question about the principles of law firmly fixed in our jurisprudence by these cases.

In the recent case of *Boston & Maine Rd.* v. *Hooker,* 233 U. S., 97, 110, the Court, speaking through *Mr. Justice Day,* quoted with approval from the opinion in the *Kansas City Southern Ry. Co.* v. *Carl, supra,* the settled principle which runs through the cases above referred to, as follows:

> "He" (the passenger or shipper) "must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate when made out and filed, is notice, and the effect is not lost, although it is not actually posted in the station. *Texas & Pacific*

Railway v. *Mugg*, 202 U. S., 242; *Chicago & Alton Ry.* v. *Kirby*, 225 U. S., 155. It would open a wide door to fraud and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay . . . (p. 654). To the extent that such limitations of liability are not forbidden by law, they become, when filed, a part of the rate."

233 U. S., 110, 111.

But we submit that in none of the above cases, nor in any provision of Section 6, nor any other section of the Act to Regulate Commerce, as amended up to the present time, is there any announcement or enactment to the effect that where a passenger has paid for a round-trip journey a rate or fare which admittedly is the lawful tariff rate for a round-trip journey between two points, a railroad, *by misrouting* the passenger, and sending him over a route in making said round-trip, which is of no particular value to him, and which does not meet his requirements any better than the route over which

the fare actually collected was the lawful tariff fare, *thereby* acquires a right of recovery against the misrouted passenger for an alleged undercharge to be calculated by obtaining the difference between the fare actually paid by the passenger and the fare the railroad seeks to conjure out of vague and misleading tariffs as the applicable rate for the erroneous route over which the passenger, without fault of his own, has been sent.

We submit that in such a case no door to fraud is opened by denying to the railroad a right of recovery, nor will denying a right of recovery in such case in any degree tend to destroy the uniform operation of the published tariff rate sheets.

In such a case the passenger has paid the lawful tariff fare for the trip over the route by which he should have been sent, and had the right to be sent; and the railroad by negligently misleading him and sending him over a different route which represents nothing of additional value to the passenger, should not be permitted to profit by its own mistake and misleading conduct.

Since the passage of the Hepburn Act and the amendment of the Act to Regulate Commerce of

June 18, 1910, in the case of *E. J. Gorman* v. *Chesapeake & Ohio R. R. Co.*, 21 I. C. C. Rep., 613, 614, where a passenger was sold a round-trip summer excursion ticket for passage from Norfolk to San Francisco and return, and the railroad's agent erroneously routed the passenger for a portion of the trip by the "Overland Limited" train, on which by a note in the tariff publishing the rate it was provided that summer excursion tickets would not be honored, and the passenger was thereby caused to spend additional money for transportation which would be honored on this train, the Interstate Commerce Commission held that such passenger was entitled to reparation.

In the case at bar, it seems to us that if on the trip as the railroad's agent routed Maxwell, he had been compelled to pay the additional sum of money now claimed against him, Maxwell could have reparation to the extent of the additional payment he had thus unnecessarily been required to make. And if this is sound, we submit that there is no reason for any rule of law requiring Maxwell to now pay an alleged undercharge which it would seem Maxwell could immediately recover by way of reparation. Such circuity of action and remedies is surely not desirable. No sound public policy will be con-

served by any such requirement. No door to fraud or other abuses will be opened in such a case by denying recovery.

We thoroughly appreciate the fundamental reasons grounded on a sound public policy, which have constrained this Court to construe rigidly the provisions of Section 6 of the Act to Regulate Commerce, forbidding carriers to collect or receive "a greater or less or different compensation" than the rates named in the tariffs of the carrier filed with the Commission. These reasons do not apply, we submit, to this case. Here the carrier, if allowed to recover the alleged undercharge, will be permitted to collect from the passenger a rate in *excess* of a *lawful tariff rate* to which the passenger was entitled, and which he would have paid had it not been for the misleading conduct of the railroad's agent in bringing about a misrouting of the passenger.

We therefore submit, even if the facts with reference to the alleged undercharge were as insisted by the railroad, or as found by the Supreme Court of Tennessee, that under the law the judgment of the Supreme Court of Tennessee should be affirmed.

CONCLUSION.

For the reasons stated by the Supreme Court of Tennessee (Tr., pp. 29-32), as well as for the reasons stated by the Court of Civil Appeals of Tennessee (Tr., pp. 21-28), we submit that the judgment of the Court of last resort of Tennessee should be affirmed.

For the additional reason that the plaintiff in error has not complied with the rules of this Court, and has not included in the record before this Court the tariffs upon which the claim of the alleged undercharge is necessarily foundationed, so as to establish affirmatively the alleged errors assigned, we submit that the judgment of the Supreme Court of Tennessee should be affirmed.

And if it should eventuate that the Court will now permit the plaintiff in error to file and use in this Court these tariffs, we submit that it plainly appears, as we have hereinbefore sought to show, from express provisions in the tariff I. C. C. No. F-1299 ("Exhibit, Pusey No. 1"), that there was really no undercharge involved in selling the two round-trip tickets to Maxwell for $49.50 each, and that such was the lawful tariff fare, plainly fixed by the provisions of said tariff, which provisions were overlooked by the plain-

tiff in error's witness Pusey, and by the State Courts of Tennessee.

For all the reasons herein advanced we earnestly insist that the judgment of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted,

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